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THE LAW OF ELECTIONS.

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A GUIDE TO ELECTION LAW

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Handwritten signatures: *W. Martin* and *M. Justice Willes*
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GUIDE TO ELECTION LAW—(continued).

of England requires him to take. We may all be thankful to the authors of this little work for the lucid and satisfactory manner in which they have introduced us to what may, in some sense, be called a new department of law, *avia Pieridum loca*, if there be any legal Muses."—*The Times*.

"In six short chapters the subjects of corrupt practices, agency, penalties, scrutiny, evidence, and disqualification of persons to be elected, are treated in a clear and concise manner. The sections of the different Acts bearing on each particular subject are given, and the *dicta* of the Judges in construing the sections are extracted from the reports. Two of the Judges, Mr. Baron Martin and Mr. Justice Willes, have themselves revised many of the extracts, and otherwise rendered assistance, which is warmly acknowledged in the preface. By means of an ample and well-arranged index, it is very easy to refer to any point upon which information is required, so that, for the future, M.P.'s who plead their ignorance and inexperience will have no excuse."—*The Pall Mall Gazette*.

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A MANUAL
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LAW OF LANDLORD AND TENANT.

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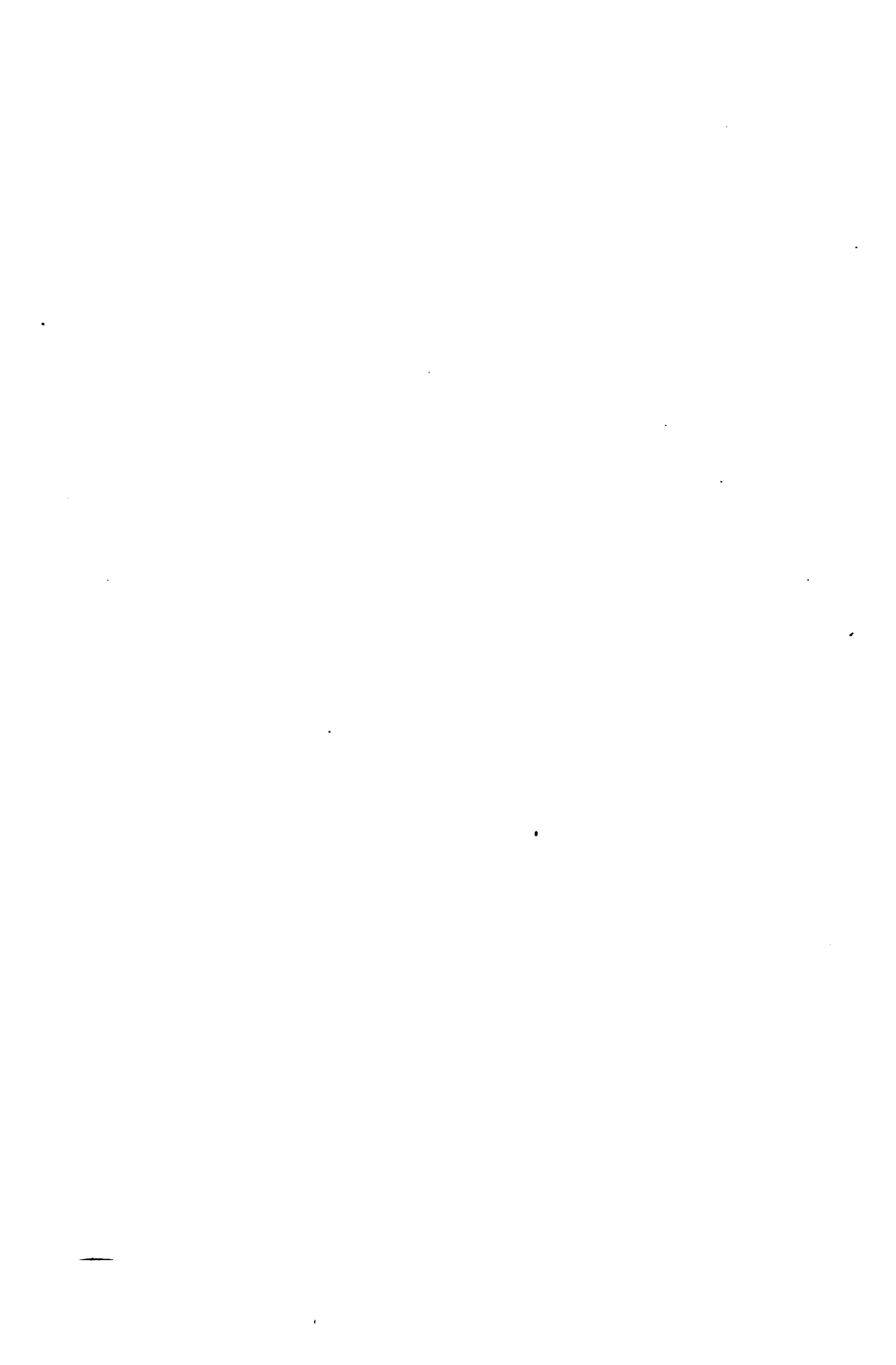
BY
HORACE SMITH, B.A.
OF TRINITY HALL, CAMBRIDGE, AND OF THE INNER TEMPLE AND MIDLAND CIRCUIT,
BARRISTER-AT-LAW;

AND
THOMAS SPOONER SODEN, M.A.
OF EXETER COLLEGE, OXFORD, AND OF THE MIDDLE TEMPLE AND MIDLAND CIRCUIT,
BARRISTER-AT-LAW.

Second Edition, Enlarged,

WITH FORMS.

LONDON:
DAVIS & SON, 57 CAREY STREET, LINCOLN'S INN, W.C.
1878.



PREFACE TO THE SECOND EDITION.

THE favourable reception of this book by both branches of the profession has induced the authors to publish a second edition.

The authors desire to express to those who so kindly reviewed the first edition their obligations for the encouragement inspired by favourable criticism, as well as for those suggestions by which the authors trust they have shown themselves capable of profiting. They venture to hope that the results of a considerable amount of care and labour, and of an earnest desire to produce a work of substantial value, will be apparent in the present edition.

The original arrangement, for which, as announced in the preface to the first edition, the authors were indebted to Mr. Cave, Q.C., met with general approval and has not been substantially changed; but an endeavour has been made to render the present edition more full and accurate throughout.

The main alterations which have been made in the text are as follows:—In Part I. the first section of Chapter IV., with respect to the different kinds of leases, has been curtailed, and it is hoped rendered more clear and perspicuous. The subjects of covenants

and reservations in mining leases and with respect to game have been enlarged, and a section added upon counterparts of leases. In Part II. the text has been made fuller in some respects, and a short chapter added on the subject of game. In Part III. the chapter on fixtures has been almost re-written. Section 3 of Chapter VI. (Compensation for Improvements), and Chapter VIII. (Resumption of Holding for Improvements) have been added. The passing of the Judicature Acts has also rendered necessary considerable alterations throughout the work.

An Appendix of Forms has been added mainly through the very great kindness of Mr. Henry Burrell of the Conveyancing Bar. Mr. Burrell's well-known reputation as a conveyancer is a sufficient guarantee for the accuracy of those forms which he has so kindly prepared for this edition, viz., the forms of leases and agreements. These, with the rest of the forms, it is hoped, will prove a valuable addition to the book.

The Agricultural Holdings Act is printed at length in the Appendix of Statutes, as well as referred to in the text.

By adopting a smaller type and margin, the authors have been able to present to the profession a work of the same bulk and at the same price as the former edition, but containing a very large amount of extra and, it is hoped, valuable material.

Shortly before the publication of this book, and after the text of the book had been fully printed, another edition of Woodfall's Landlord and Tenant appeared. That work had, as was hinted in the preface to the first edition of the present authors' book, grown to an unwieldy size, and the authors hope they may be

allowed to congratulate Mr. Lely upon his having successfully reduced the work in question to more moderate dimensions; but the authors still believe that they may fairly expect to hold, as they said in their first edition, "a middle place between the elaborate but expensive treatise of Woodfall and the outlines contained in the Lectures of Mr. J. W. Smith."

The statutes and cases have been brought up to the beginning of March 1878.

HORACE SMITH.

THOMAS SPOONER SODEN.

TEMPLE, *March* 1878.

PREFACE TO THE FIRST EDITION.

SOME time ago Mr. Cave conceived the idea of writing for the use of the profession generally, a Manual of the Law of Landlord and Tenant, which should hold a middle place between the elaborate but expensive treatise of Woodfall, and the outlines contained in the Lectures of Mr. J. W. Smith. He accordingly sketched out the ground-plan of the present work, and had written some portions of it, when he found himself unable, from the pressure of other business, to carry out his design.

Under these circumstances the authors, at his request, undertook to continue the work thus interrupted; and, in the course of their labours, have had the advantage of consulting with Mr. Cave, and of submitting the proof-sheets to him for revision.

The authors have spared no pains in endeavouring to make the Treatise as accurate as possible, and hope it will prove to be a clear and concise statement of the law, as well as a useful book of reference.

HORACE SMITH.

THOMAS SPOONER SODEN.

TEMPLE, *May* 1871.

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ADDENDA ET CORRIGENDA.

- Pages 3-7, 10, 17, 18, 22—The statutes relating to leases of Settled Estates are now consolidated by the 40 & 41 Vict. c. 18.
- Page 7, line 17—The new Act of 1877 omits the words "on non-observance of any of the covenants or conditions therein contained."
- Page 35, note (w)—*Haud v. Hall* has been reversed on Appeal, 46 L. J. Exch. 603.
- Page 36, at foot of note (a), *add*—See also *Angell v. Duke*, L. R. 10, Q. B. 174, 44 L. J. Q. B. 78. If a new agreement is made by parol the old one is done away with, and the new one if not within the statute is void also, *Sanderson v. Graves*, 44 L. J. Ex. 210.
- Page 61, note (k), *add*—See also *Coleman v. Bathurst*, L. R. 6, Q. B. 366, 40 L. J. M. O. 131.
- Page 70, note (g), *add*—By the Judicature Act 1873, s. 25, sub-sect. 5, a mortgagor without notice from the mortgagee of his intention to enter, may now sue in his own name.
- Page 87, note (n), after *Backland v. Papillon*, *add*—See also *Hampshire v. Wickens*, L.R. Weekly Notes, Feb. 9, 1878, p. 26.
- Page 91 note (b), *add*—A covenant is sometimes inserted that a house shall be used as a private dwelling-house only. Putting up a blind with the words "Alpheus Andrews Coal office, and at the Coal Exchange" (*Wilkinson v. Rogers*, 2 De Gex, J. & S. 62), and, keeping a girls' school (*German v. Chapman*, L. R. Weekly Notes, Dec. 8, 1877, C. A. p. 243) have been held to be breaches of such a covenant.
- Page 102, note (g), *add*—But now there is no implied covenant under a contract to assign a term of years, and the intended assign is not entitled to call for the title to the freehold.—See 37 & 38 Vict. c. 78, s. 2.
- Page 102, note (f), *add*—*Mostyn v. West Mostyn Coal Co.*, L. R. 1, C. P. D. 145; 45 L. J. C. P. 401.
- Page 113, note (w), *add*—By the 39 & 40 Vict. c. 16, s. 11, "Any instrument, whereby the rent reserved by any other instrument chargeable with stamp duty as a lease or tack and duly stamped accordingly is increased, shall not be chargeable with stamp duty otherwise than as a lease or tack in consideration of the additional rent thereby made payable."
- Page 133, note (j), *add*—See also *Paget v. Marquis of Anglesea*, L. R. 17, Eq. 283.
- Page 157, note (2), *add*—The above section is repealed by the 37 & 38 Vict. c. 57, and re-enacted, substituting twelve years for twenty; but this Act does not come into operation until the 1st of January 1879.
- Page 163, line 12 from bottom, *add*—So much of the above section as requires any sheriff or undersheriff or constable to be aiding and assisting at any distress for rent or to swear any appraiser thereat is repealed, and no oath is required by the 35 & 36 Vict. c. 92, s. 13.
- Page 172, line 13, after the word "owner" insert note (bb)—Mere enjoyment of use of goods will entitle to sue in replevin.—*Fell v. Whitaker*, ante, p. 169.
- Page 173, note (w), *add*—And see *Gibbs v. Cruikshank*, L. R. 8, C. P. 454, 42 L. J. C. P. 273.

- Page 181, note (x), *add*—L. R. 8, C. P. 79, 42 L. J. C. P. 46.
- Page 183, note (o), after *Hughes v. Met. Rly. Co.*, *add*—*Affirmed*, 46 L. J. H. L. 583.
- Page 190, line 10—It seems that, where a tenant obtains specific performance and has been kept out of possession, the lease must express that rent is only to commence subsequently to his obtaining possession, and upon the day of the month originally agreed upon.—*Weasley v. Walker*, L. R. Weekly Notes, Feb. 9, 1873, p. 29.
- Page 190, note (e), *add*—See also *Ainley v. Dawson*, L. R. Weekly Notes, Feb. 2, 1878, p. 19.
- Page 193, at foot, *add*—The grantor of an ordinary right of shooting may cut down timber even to the prejudice of the shooting.—*Gearns v. Baker*, *ante*, p. 61.
- Page 193, note (e), *add*—See also *Morgan v. Griffiths*, L. R. 6, Ex. 70; 40 L. J. Ex. 46.
- Page 203, note (t)—Notice by the assignee of the assignment to him is necessary under the 4 Ann. c. 16, s. 9 in the case of a breach of the covenant to pay rent; but this does not apply to breaches of other covenants.—*Seattook v. Harston*, *ante*, p. 182.
- Page 214, note (s), *add*—See also *Holme v. Brunskill*, 47 L. J. C. P. 81.
- Page 250, note (d), *add*—See also *Cross v. Barnes*, 46 L. J. Q. B. 479.
- Page 262, note (t), for "Plight" read "Flight."
- Page 272, line 3—A disclaimer under section 23 *supra* operates as a surrender from the date of the trustee's appointment, and fixtures would then become the property of the landlord, and the trustee would have no right to recover them.—*Ex parte*, *Stephens*, in *re* *Lavies*, L. R. Weekly Notes, Dec. 8, C. A. 47 L. J. Bkcy. 22.
- Page 275, after *in re* *Coal Consumers Co.*, *add*—"In *re* *Regent United Service Stores*, L. R. Weekly Notes, Feb. 2, 1878, p. 21, and *in re* *North Yorkshire Iron Co.*, *ib.*
- Page 314, old ed. note (a), *add*—"See also *Meux v. Jacobs*, *ante*, p. 241, *ex parte* *Barclay*, L. R. 9 Ch. 577."

A MANUAL

OF THE

LAW OF LANDLORD AND TENANT.

PART I.

CREATION OF THE TENANCY.

CHAPTER I.

OF LESSORS.

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By law all land is ultimately held of the sovereign. No subject, therefore, can possess a greater estate in law than a tenancy, a word which implies the holding from some superior; but the more ordinary use of the word tenancy is where it is intended to mean a holding for a certain definite term, subject to some rent or fine, accompanied by certain obliga-

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tions of the lessor and lessee respectively. Upon such a holding arises the ordinary relation of landlord and tenant; and it is to the nature and incidents of such a holding, and the obligations arising from it, that the present volume is intended to be confined. In the present chapter it is proposed to show who may be lessors.

1. TENANTS IN FEE-SIMPLE.

The tenant in fee-simple has the entire uncontrolled disposition of the property, and may demise for any term whatever (*a*). By the common law, any person seised of an estate in fee-simple in lands could convey the lands to be held of himself in fee-simple, and thus create a tenancy in fee-simple between himself and his grantee; but by the statute of *quia emptores* (*b*), no tenancy in fee-simple which has been created since the passing of that Act can any longer be held of a subject (*c*).

2. TENANTS IN TAIL.

At common law.

At common law a tenant in tail might make a lease for his own life (*d*). If a tenant in tail after the statute *De donis* (*e*) made a lease for years and died, the lease was not absolutely determined by his death, but the issue in tail might affirm or avoid it (*f*). Acceptance of the rent, or bringing an action for recovery of rent, or an action of waste, were such acts as would amount to a confirmation, because these plainly manifested an intent to keep the lessee in possession upon the terms of his lease (*g*). But if the tenant made an under-lease, and the issue in tail accepted rent from the under-lessee, this would have been no confirmation of the lease. If the tenant *assigned* part of the land for the residue of the term, and the issue accepted rent from the assignee, this would have confirmed the lease (*h*). If the tenant in tail died whilst the right of the lessee was but an *interesse termini* (*i*), and the issue entered and aliened, the alienee might elect to confirm or avoid the lease (*j*). But if the tenant in tail granted an immediate lease, and the issue aliened without entry, the alienee was bound by the lease, by reason that the issue had only a right of entry, which is not alienable (*k*).

(a) Com. Dig. tit. Estate, (G) 2.

(b) 18 Ed. I. c. 1.

(c) Stephen's Blackstone, i. 240.

(d) Com. Dig. tit. Estate, (G) 2.

(e) 13 Ed. I. c. 1.

(f) Bac. Abr. Leases, (D) 1; Co. Litt. 45.

(g) Bac. Abr. Leases, (D) 1.

(h) Bac. Abr. Leases, (D) 1.

(i) See *infra*, c. 4, s. 1 n. (v).

(j) Bac. Abr. Leases, (D) 1; Co. Litt. 349.

(k) Bac. Abr. tit. Leases, 311, 315, 324.

Neither persons in remainder nor in reversion were bound by the leases of the tenant in tail; against them such leases were void, and they could not confirm them on the death of the tenant in tail (*l*).

By the 32 Hen. VIII. c. 28, a tenant in tail was enabled to make leases for twenty-one years or three lives, if such leases were made in conformity with the provisions of the statute. Such leases were binding on the issue in tail, but not on the remainder-man or reversioner (*m*). Enabling statutes.

The statute of Hen. VIII. is repealed by the 19 & 20 Vict. c. 120, ss. 32, 35, by which a tenant in tail of settled estates has the same power to make leases as a tenant for life has (*n*). Leases made by persons having an estate in right of their churches are, however, excepted in the repealing section, and therefore as to them the statute of Hen. VIII. still applies (*o*).

By the 3 & 4 Will IV. c. 74, called the Act for the Abolition of Fines and Recoveries, after the 31st day of December 1833, every actual tenant in tail (*p*), whether in possession, remainder, contingency, or otherwise, has full power to dispose of for an estate in fee-simple absolute, or for any less estate, the lands entailed, as against the issue in tail (*q*), and if there be a protector of the settlement, with his consent as against all persons whose estates are to take effect after the determination, or in defeasance of such estate tail (*r*). By sect. 41 every assurance by a tenant in tail, except a lease not exceeding twenty-one years, commencing from the date of such lease, or from any time not exceeding twelve months from the date of such lease, at a rack-rent, or not less than five-sixths of a rack-rent, is inoperative, unless such assurance is enrolled in Chancery within six months after its execution (*s*). Fines and recoveries.

3. TENANTS FOR LIFE.

At common law a tenant for life cannot make a lease to continue longer than his own life. It determines absolutely At common law.

(*l*) Co. Litt. 45 b; Doe *d.* Phillips v. Rollings, 4 O. B. 188.

(*m*) See Rowdon v. Maltster, Cro. Car. 42; Doe v. Jenkins, 5 Bing. 469; Rees v. Phillips, Wight. 69; Doe *d.* Phillips v. Rollings, 4 O. B. 180; Bac. Abr. tit. Leases, (D); Co. Litt. 44 a; 8 Co. 34; Lampet's case, 3 Co. 64 b. The above statute is repealed by the 19 & 20 Vict. c. 120, s. 32, *infra*.

(*n*) See *infra*, Tenant for Life.

(*o*) See *infra*, p. 12.

(*p*) See *infra*, pp. 17, 19, and 20, as to infants, lunatics, or married women who are tenants in tail. See 19 & 20 Vict. c. 120.

(*q*) Sect. 15.

(*r*) Sect. 34.

(*s*) The deed may be enrolled by either vendor or purchaser, and the enrolment should be made as soon

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on his death (*t*), or at the end of the then current year of the tenancy (*u*), and cannot be confirmed by any acts of the remainder-man or reversioner (*v*); but such acts as the receipt of rent will be evidence of a new tenancy from year to year on the terms of the original lease (*w*), except where the remainder-man receives the rent in ignorance of the terms of the lease (*x*). If the remainder-man, however, lies by, and with notice of what the tenant is about to do permits him to lay out money in rebuilding, equity will interfere and prevent him from insisting on the determination of the lease (*y*).

By statute.

By the 19 & 20 Vict. c. 120, s. 32, "It shall be lawful for any person entitled to the possession or to the receipt of the rents and profits of any settled estates for an estate for life (*z*) or for a term of years determinable with his life, or for any greater estate, either in his own right or in right of his wife, unless the settlement shall contain an express declaration that it shall not be lawful for such person to make such demise; and also for any person entitled to the possession or to the receipt of the rents and profits of any unsettled estates as tenant by the curtesy or in dower, or in right of a wife who is seised in fee, without any application to the Court (*a*), to demise the same, or any part thereof, except the principal mansion-house and the demesnes thereof and other lands usually occupied therewith, from time to time, for any term not exceeding twenty-one years, to take effect in possession: provided that every such demise be made by deed, and the best rent that can reasonably be obtained be thereby reserved, without any fine, or other benefit in the nature of a fine, which rent shall be incident to the immediate reversion; and

as possible after execution. *Cattell v. Carroll*, 4 Y. & C. 228. If the lands lie in a register county, the deed must, it is conceived, be enrolled in compliance with the local Acts, as well as under this Act. Enrolment is not necessary for a lease of copyhold land, but there must be an entry on the court rolls within six calendar months. See 3 & 4 Will. IV. c. 74, s. 54; and *Gibbons v. Snape*, 1 De G. J. Sm. 621, 33 L. J. Ch. 103.

(*t*) *Bac. Abr. Leases*, (1); *Adams v. Gibney*, 6 Bing. 656.

(*u*) 14 & 15 Vict. c. 25, s. 1.

(*v*) *Doe d. Simpson v. Butcher*, Doug. 50; *Jenkins d. Yates v. Church*, Cowp. 482; *Roe d. Jordan v. Ward*, 1 Hen. Bl. 97; *Doe*

d. Potter v. Archer, 1 Bos. & Pul. 531; *Ludford v. Barber*, 1 T. R. 86; *Jones v. Verney*, Will. 196.

(*w*) *Doe d. Martin v. Watts*, 7 T. R. 83; *Doe d. Collins v. Weller*, ib. 478; *Roe d. Bruns v. Prideaux*, 10 East. 158; *Doe d. Tucker v. Morse*, 1 B. & Ad. 365; *Doe d. Pennington v. Taniers*, 12 Q. B. 998.

(*x*) *Oakley v. Monk*, L. R. 1 Ex. 159; 35 L. J. Ex. 87.

(*y*) *Stiles v. Cowper*, 3 Atk. 692; *East India Co. v. Vincent*, 2 Atk. 83; *Jackson v. Cator*, 5 Ves. 688; *Dunn v. Spurrier*, 7 Ves. 231, 235, 236.

(*z*) This will include a tenant in tail after possibility of issue extinct. See sect. 2.

(*a*) Of Chancery.

provided that such demise be not made without impeachment of waste, and do contain a covenant for payment of the rent, and such other usual and proper covenants as the lessor shall think fit; and also a condition of re-entry on non-payment, for a period of not less than twenty-eight days, of the rent thereby reserved, and on non-observance of any of the covenants or conditions therein contained; and provided a counterpart of every deed of lease be executed by the lessee."

By sect. 33, "Every demise authorised by the last preceding section shall be valid against the person granting the same, and all other persons entitled to estates subsequent to the estate of such person under or by virtue of the same settlement, if the estates be settled; and, in the case of unsettled estates, against all persons claiming through or under the wife (or husband), as the case may be, of the person granting the same;" and by the 21 & 22 Vict. c. 77, s. 8, against the wife of a husband entitled in her right.

By the 19 & 20 Vict. c. 120, s. 34, "The execution of any lease by the lessor or lessors shall be deemed sufficient evidence that a counterpart of such lease has been duly executed by the lessee, as required by this Act."

By sect. 41, "For the purposes of this Act a person shall be deemed to be entitled to the possession, or to the receipt of the rents and profits of estates, although his estate may be charged or encumbered either by himself or by the settlor, or otherwise howsoever, to any extent; but the estates or interests of the parties entitled to any such charge or encumbrance shall not be affected by the acts of the person entitled to the possession, or to the receipt of the rents and profits as aforesaid, unless they shall concur therein."

By sect. 43, "Nothing in this Act shall authorise the granting of a lease of any copyhold or customary hereditaments not warranted by the custom of the manor, without the consent of the lord, nor otherwise prejudice or affect the rights of any lord of a manor."

By sect. 44, "The provisions of this Act shall extend to all settlements, whether made before or after it shall come in force, except those as to demises to be made without application to the Court, which shall extend only to settlements made after this Act shall come in force."

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Tenant *pur
autre vie*.

A tenant *pur autre vie* is in the same position as an ordinary tenant for life, except that his leases will determine, not on his own death, but on that of the *cestui que vie*, or rather at the expiration of the then current year of the tenancy (b); and he may therefore make a lease to commence after his own death (c). By the 19 Car. II. c. 6, after reciting that whereas divers lords of manors and others have use to grant estates by copy of court-roll, for one, two, or more lives, according to the custom of their several manors, and have also granted estates by lease for one or more life or lives, or else for years determinable upon one or more life or lives, it is enacted by sect. 2, that "if the person or persons for whose life or lives such estates have been or shall be granted, as aforesaid, shall remain beyond the seas, or elsewhere absent themselves in this realm, by the space of seven years together, and no sufficient and evident proof be made of the lives of such person or persons respectively in any action commenced for recovery of such tenements by the lessors or reversioners, in every such case the person or persons upon whose life or lives such estate depended shall be accounted as naturally dead; and in every action for the recovery of the said tenement by the lessors or reversioners, their heirs or assignees, the judges before whom such action shall be brought shall direct the jury to give their verdict as if the person so remaining beyond the seas, or otherwise absenting himself, were dead." Sect. 3 contains a proviso respecting persons evicted under the Act, when the *cestuis que vie* turn out not to be dead. The 6 Anne, c. 18, contains provisions enabling the Court of Chancery, in certain cases, to cause the *cestuis que vie* to be produced.

Tenants after
possibility of
issue extinct, by
the curtesy, ten-
ants in dower or
jointure.

The estates of tenants after possibility of issue extinct, by the curtesy, or in dower or jointure, though growing out of the original estate of inheritance, afford them no more than a life-interest; such tenants, therefore, stand precisely on the same footing as tenants for life, and are restricted to the like limits in the disposal of their lands (d).

Husband leasing
wife's land.

First, As to wife's freehold (e); at common law, a lease by deed made by the husband and wife, or by the husband alone, of the wife's freehold is good during the coverture (f).

(b) 14 & 15 Vict. c. 25, s. 1.

(c) Dale's case, Cro. Eliz. 182.

(d) See *ante*, p. 3, Tenants for Life, and 19 & 20 Vict. c. 120.

(e) See *post*, p. 19, Married Women; and Part 4, c. 2, s. 3.

Married Women's Property Act, 1870.

(f) Wiscot's case, 2 Co. R. 61 b; Bateman v. Allen, Cro. Eliz. 438; Bac. Abr. tit. Leases, (C) 1; 2 Wms. Saund. 180 n. (g).

Upon the death of the husband in the wife's lifetime, it is voidable by her, but may be confirmed by her; as, for instance, by the acceptance of rent due after the husband's death (*g*), and the lessees will be liable upon the covenants although the widow does nothing to confirm the lease (*h*). But where a lease is made by husband and wife without deed, it is void as against the surviving wife, for it cannot be said to be her lease (*i*). If the husband survives his wife, and becomes tenant by the curtesy, the lease as against him will be good during his life, or until the end of the term, if that should first happen; but if the husband survives the wife, and does not become tenant by the curtesy, the lease, upon the wife's death, will be void as against her heir-at-law, and those claiming through her (*j*).

By the Enabling Act, 32 Hen. VIII. c. 28, husbands seised in right of their wives, or jointly with their wives, for any estate in fee or in tail, were empowered to grant leases for any term not exceeding twenty-one years or three lives, subject to certain restrictions (*k*); but this Act was repealed by the 35th sect. of the 19 & 20 Vict. c. 120.

By the 19 & 20 Vict. c. 120 (*l*), ss. 32, 33, amended by the 21 & 22 Vict. c. 77, s. 8, and the 37 & 38 Vict. c. 33, a husband seised in right of his wife of any settled estates for an estate for life, or for a term of years determinable with her life, or for any greater estate (unless the settlement contains an express declaration to the contrary); and also a husband entitled to the possession, or to the receipt of the rents and profits of any *unsettled estates*, as tenant by the curtesy, or in right of a wife who is seised in fee, can, without any application to the Court of Chancery, make leases for any term not exceeding twenty-one years, if made in accordance with the provisions of these statutes (*m*).

Secondly, As to the wife's chattel interests (not being

(*g*) *Henstead's case*, 5 Co. R. 10; (on appeal), 4 B. & C. 529; and see Co. Litt. 55 b; *Anon. Dyer*, 159 pl. 36; 1 Roll Abr. 349; *Greenwood v. Tyber*, Cro. Jac. 563; *Jackson v. Mordaunt*, Cro. Eliz. 112; *Doe d. Collins v. Weller*, 7 T. R. 478; 2 Wms. Saund. 180 n. (*q*).

(*h*) *Toler v. Slater*, L. R. 3 Q. B. 42; 37 L. J. Q. B. 93. (*k*) See *ante*, Tenants in Tail, p. 2, and Ecclesiastical Corporations, p. 16; also Bac. Abr. tit. Leases, (O) 1; and 2 Wms. Saund. 180 n. (*q*).

(*i*) *Walsall v. Heath*, Cro. Eliz. 656; *Greenwood v. Tyber*, Cro. Jac. 564; 2 Wms. Saund. 180 a (n.).

(*j*) *Hill v. Saunders*, 2 Bing. 112 (m) See *ante*, Tenants in Tail, pp. 2 and 3.

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choses in action), the husband, at common law, has the absolute disposal of them during his life (*n*), and may not only make leases of them to commence *in presenti*, but even to commence after his death (*o*).

4. PERSONS HAVING LESS THAN A FREEHOLD INTEREST.

Tenants for years.

A tenant for years may part with any portion of his term by way of lease, and the grantee thereof will become his tenant; but if he make a lease for the whole of his term, it will operate as an assignment, and no tenancy will be created between him and the grantee, who will hold of the lessor of whom the tenant for years himself held, and will, in fact, occupy his place (*p*).

Tenant from year to year.

A tenant from year to year is considered to have such an interest in the land demised that he may lease it for years, and the term will continue in force so long as his own tenancy lasts (*q*). So also he may under-let from year to year during the continuance of the original demise (*r*), and, in either case, he will have a reversion (*s*).

Tenants for less than years.

Under a tenancy for one year, or for less than one year, provided it is for a term fixed and certain, the tenant has the same power of assigning or leasing as a tenant for years (*t*).

Tenants at will.

Tenants at will, or on sufferance, cannot demise (*u*).

(*n*) But he cannot devise them, for his devise does not take effect until his death, when his interest ceases. Bac. Abr. tit. Baron and Feme, c. 2.

(*o*) Co. Litt. 46 b, 300, 351 a. See *Druce v. Dennison*, 6 Ves. 385; *Wildman v. Wildman*, 9 Ves. 177; *Fitzgerald v. Fitzgerald*, 8 C. B. 592; Bac. Abr. tit. Baron and Feme, c. 2; but see *infra*, "Married Women's Property Act, 1870," Part 4, c. 2, s. 3.

(*p*) *Hicks v. Downing*, 1 Ld. Raym. 99; *Wollaston v. Hakewill*, 3 M. & G. 297; *Thorn v. Woolcombe*, 3 B. & Ad. 586; *Parmenter v. Webber*, 8 Taunt. 593; *Beardman v. Wilson*, L. R. 4 C. P. 57; 38 L. J. C. P. 91. See *Preece v. Corrie*, 5 Bing. 24, unless the lease be by verbal agreement; or unless it

be the manifest intention of the parties to create a lease, see *Williams v. Hayward*, 28 L. J. Q. B. 374; *Pollock v. Stacey*, 9 Q. B. 1033; *Baker v. Gostling*, 1 Bing. N. C. 19; but as to the recovery of rent, see *post*, c. 4, s. 6.

(*q*) *Mackray v. Mackreth*, 4 Doug. 213.

(*r*) *Oxley v. James*, 13 M. & W. 209.

(*s*) *Pike v. Eyre*, 9 B. & C. 909; *Curtis v. Wheeler, Moo. & M.* 495.

(*t*) *Rex v. Aldborough*, 1 East. 598; *Shep. Touch.* 268.

(*u*) *Sureper v. Randal*, Cro. Eliz. 156; *Sparke's case*, Cro. Eliz. 156; *Moss v. Gallimore*, 1 Doug. 279; *Jones v. Clerk*, Hard. 47; *Dinsdale v. Iles*, 2 Lev. 88. S. C., *Sir T. Ray*, 224, 1 Ventr. 247; *Birch v. Wright*, 1 T. R. per Buller, J., 382.

5. JOINT-TENANTS, TENANTS IN COMMON, AND COPARCENERS.

Joint-tenants should join in making a lease, for if one of two joint-tenants make a lease of the whole, his moiety only will pass (*v*); and if a lease purporting to be made by both is executed by one only, it will pass nothing more than the moiety of him who has executed it (*w*). A lease of his moiety by a joint-tenant, who subsequently dies, will bind the survivor, and this even if the lease be made to commence after the lessor's death (*x*). Where joint-tenants make a lease, and one dies, the survivors are entitled to the whole rent, and the interest of the lessee continues (*y*). Tenants in common cannot make a joint-lease of the whole of their estate (*z*); and if the lease purport to do so, it is merely the lease of each for their respective parts, and the confirmation of each for the part of the other; neither is there any estoppel, because an actual interest passes from each respectively (*a*). If one joint-tenant or tenant in common makes a lease for years of his part to his companion, this is good, and such a lease extinguishes the jointure for the time, and gives a right of distress (*b*). A joint-lease by coparceners operates as a several demise by each of her own share (*c*). One coparcener cannot sue separately for her portion of the rent accruing to her and her fellows upon a lease made by the ancestor (*d*), although it would probably be different if the lease had been made by the coparceners.

6. MORTGAGOR AND MORTGAGEE.

All leases made by a mortgagor subsequent to the mortgage and before the foreclosure, except under an express

- (*v*) *Bellingham v. Alsop*, Cro. Jac. 53; Co. Litt. 186 a.
 (*w*) *Cartwright's case*, 1 Vent. 136.
 (*z*) *Grute v. Locroft*, Cro. Eliz. 287; *Harbin v. Barton*, Moor. 395; *Whitlock v. Horton*, Cro. Jac. 91; *Bellingham v. Alsop*, Cro. Jac. 52; *Clerk v. Clerk*, 2 Vern. 323, Litt. s. 289.
 (*y*) *Henstead's case*, 5 Co. Rep. 10 b; *Doe d. Aalin v. Summersett*, 1 B. & Ad. 135, 140.
 (*a*) Com. Dig. Estates, (K) 8; *Burne v. Cambridge*, 1 Moo. & R. 539; *Heatherly d. Worthington v. Weston*, 2 Wills. 283; *Doe v. Errington*, 1 A. & E. 750.
 (*a*) *Mantle v. Wollington*, Cro. Jac. 166; *Brooks v. Foxcroft*, Clayt. 137; *Jurdain v. Steere*, Cro. Jac. 83; Com. Dig. tit. Estates, (G) 6, (K) 8; Bac. Abr., Joint-Tenants and Tenants in Common, (H) 1; 1 Roll. Ab. 877, (L) 48, 52.
 (*b*) Bac. Abr. tit. Leases, (I) 5, p. 401; Co. Litt. 186 a; *Cowper v. Fletcher*, 34 L. J. Q. B. 187.
 (*c*) *Milliner v. Robinson*, Moore, pl. 939.
 (*d*) *Decharms v. Horwood*, 10 Bing. 526.

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power (e), are void as against the mortgagee (f); but such leases are by estoppel good as between the parties (g). The mortgagee in possession cannot make a lease so as to bind the mortgagor if he should afterwards redeem (h), unless to avoid an apparent loss, and merely of necessity (i). In practice, when it is necessary to make a lease of the mortgaged premises, both mortgagor and mortgagee should join in the lease (j).

7. LORDS OF THE MANOR AND COPYHOLDERS.

Lords of manors may make voluntary grants of copyholds as well as admittances, according to the custom of the manor (k). Where there is no custom for that purpose, the lord of the manor cannot make a new grant of copyhold (l). By 13 Geo. III. c. 81, s. 15, lords of manors, with the consent of three-fourths of the commoners, may demise for not more than four years any part of the wastes and commons, not exceeding one-twelfth part, for the best rent that can be obtained by auction, the same to be applied in draining, fencing, and improving the residue.

A copyholder cannot make a lease for more than one year without a license or by special custom, without thereby incurring a forfeiture of his estate (m); but he may for a less term by custom of the manor (n). By special custom a copyholder may make a lease for years, or for life, without license from the lord (o). A custom for copyholders in fee to lease for any number of years, without license, on condition of the term ceasing on the lessor's death, is a good custom (p). The powers of leasing given by sect. 32 of 19 & 20 Vict. c. 120 (q), are extended by 21 & 22 Vict. c. 77, s. 3, to the lords of settled manors who may give licenses to their copy-

(e) *Bevan v. Habgood*, 30 L. J. Ch. 107.

(f) *Powell on Mortgages*, 157; *Keech v. Hall*, 1 Doug. 21; *Thunder d. Weaver v. Belcher*, 3 East. 449-451.

(g) *Outhbertson v. Irving*, 28 L. J. Ex. 306.

(h) *Powell on Mortg.* 188; *Franklin v. Ball*, 34 L. J. Ch. 153.

(i) *Hungerford v. Clay*, 9 Mod. 1.

(j) *Doe d. Barney v. Adams*, 2 C. & J. 232; *Doe d. Hughes v. Bucknell*, 8 C. & P. 566; *Carpenter v. Parker*, 3 C. B. N.S. 206; *Franklin v. Ball*, *supra*; *Saunders v. Merryweather*, 3 H. & C. 902.

(k) *Badger v. Ford*, 3 B. & Ald. 153.

(l) *Rex v. Hornchurch*, 2 B. & Ald. 189; *Rex v. Welby*, 2 M. & S. 504.

(m) *Anon. Moor*, 184; *East v. Harding*, Cro. Eliz. 489; *Jackman v. Hoddesden*, Id. 351.

(n) 1 *Scriven on Copyholds*, 457.

As to what is a lease by a copyholder for more than one year, see *Lady Montague's case*, Cro. Jac. 301; *Luttrell v. Weston*, Id. 308; *Matthews v. Whetton*, Cro. Car. 233.

(o) 1 *Scriven on Copyholds*, 457.

(p) *Turner v. Hodges*, Hutt. 101.

(q) See *ante*, s. 2, *Tenants for Life*, p. 4.

hold and customary tenants to grant leases. The copyholder, however, having license to demise, ought not to exceed the license (*r*), but he may lease for a shorter term than that permitted by the license (*s*). A tenant at will of a manor cannot grant a copyholder license to alien for years; and if a tenant for life of a manor grants a license to alien for years, it determines at his death (*t*). A lease by a copyholder, without license of the lord, and contrary to the custom of the manor, is good against all but the lord (*u*). If a copyholder make a lease with license, the lessee may assign without license, or make an under-lease (*v*).

8. CORPORATIONS.

At common law a corporation may make a lease by deed Corporations. under their seal for any term of years or for lives, consistently with their estate, which lease will be binding upon their successors, except in cases where their power so to demise has been taken away by Act of Parliament, or is affected by their bye-laws and statutes (*w*). But a tenancy from year to year may arise under a demise by a corporation not under seal (*x*).

By the 1 Anne, c. 7, s. 5, the Crown is restrained from The Crown. granting leases for a longer term than twenty-one years or three lives, and subject to certain conditions; and with respect to building or repairing leases, to fifty years or three lives.

The power of municipal corporations to lease their lands is Municipal corporations. restrained by the 5 & 6 Will. IV. c. 76, ss. 94-96, by which they are prohibited from granting leases for a longer term than thirty-one years without the consent of the Lords Commissioners of the Treasury (*y*), except in the case of renewed

(*r*) *Hadden v. Arrowsmith*, 1 Q. B. 416; *Doe d. Robinson v. Bousfield*, 6 Q. B. 492.

(*s*) *Com. Dig. Copyhold*, (K) 3. Though if he do so, it is a good lease, except against the lord, who may claim the forfeiture or waive it. *Doe d. Robinson v. Bousfield*, 6 Q. B. 492.

(*t*) *Goodwin v. Longhurst*, Cro. Eliz. 535; *Worledge v. Benbury*, Cro. Jac. 437; *Isherwood v. Oldknow*, 3 M. & S. 382; *Easton v. Pratt*, 2 H. & C. 676.

(*u*) *Com. Dig. tit. Copyhold*, (C) 3.

(*v*) *Doe d. Tressider v. Tressider*, 1 Q. B. 416; *Doe d. Robinson v. Bousfield*, 6 Q. B. 492.

(*w*) *Smith v. Barrett*, 1 Sid. 161.

(*x*) *Ecclesiastical Commissioners v. Merrill*, L. R. 4 Ex. 162; 38 L. J. Ex. 93. *Doe d. Pennington v. Tanieres*, 12 Q. B. 998; but see *Finlay v. Bristol and Exeter Ry. Co.*, 7 Exch. 415.

(*y*) By consent they may grant a lease for 999 years; and see 37 & 38 Vict. c. 59, where forms of lease and assignment are given in the schedule.

- CHAP. I.** leases (a), and building leases for terms not exceeding seventy-five years.
- Trustees of settled estates.** By the 19 & 20 Vict. c. 120 (a), the Court of Chancery may authorise leases of settled estates on certain conditions, if the application be unopposed (b).
- By trustees of charities.** By the 16 & 17 Vict. c. 137, the 18 & 19 Vict. c. 124, and the 23 and 24 Vict. c. 136, trustees of charities have power to lease lands (c).
- By local authorities.** The local authority under the Artisans' Dwellings Act, 38 & 39 Vict. c. 36, s. 9, has power to grant leases under certain conditions. The local authority under the Public Health Act, 1875, 38 & 39 Vict. c. 55, s. 177, may let for any term any lands which they may possess.
- Railway companies.** In making leases a railway company must strictly comply with the terms of its Act of Parliament, and the lease must contain all proper and usual covenants on the part of the lessee for maintaining the railway in good repair and working condition (d).
- Ecclesiastical and eleemosynary corporations.** At the common law, ecclesiastical corporations aggregate and eleemosynary corporations could make any lease they thought fit to make consistent with their estate, and so could ecclesiastical corporations sole, with the consent of certain other persons. Thus, for example, archbishops and bishops could make leases with the consent of their dean and chapter (e).
- Enabling statute.** By the 32 Hen. VIII. c. 28, s. 1 (called the Enabling Statute) (f), all persons seised of lands in fee-simple in right
- (e) *Att.-Gen. v. Gt. Yarmouth*, 21 Beav. 625.
 (a) Amended by the 21 & 22 Vict. c. 77, 27 & 28 Vict. c. 45.
 (b) In *re Merry*, 36 L. J. Ch. 168. Where there is no power to grant leases in the settlement, see *Savile v. Bruce*, 29 Bea. 557; *Cust v. Middleton*, 3 De G. F. & J. 33.
 (c) See also 35 & 36 Vict. c. 24, ss. 10, 11, as to the effect of incorporation of trustees and the use of the common seal.
 (d) 8 & 9 Vict. c. 20, s. 112. *Kent*
- Coast Ry. Co. v. L. C. & D. Ry. Co.*, L. R. 3 Ch. 656.
 (e) Bishop of Salisbury's case, 10 Rep. 60; *Anon. Dyer*, 58 b, pl. 7; *Co. Litt.* 301 a; *Bac. Abr. Leases*, (G) 2. As to the persons by whom confirmation is to be made, see *Woodfall, Landlord and Tenant*, p. 21, 10th ed.
 (f) This Act has been repealed by 19 & 20 Vict. c. 120, except so far as relates to leases made by persons having an estate in right of their churches.

of their churches (g), (except parsons and vicars) (h), could make leases for twenty-one years, or three lives, without the confirmation of any person, provided they conformed to the conditions imposed by the statute. These large powers were found inconvenient in practice, and have been restrained by several statutes (i), the result of which is as follows:—

1. Where archbishops and bishops do not follow the provisions of the statute 32 Hen. VIII. c. 28, they may make leases for twenty-one years, or three lives (but for no longer period), with the confirmation of their deans and chapters, so that they pursue the provisions of the 1 Eliz. c. 19 (j). Disabling statutes.

2. All other ecclesiastical corporations *sole*, including parsons and vicars *with confirmation*, and all ecclesiastical and eleemosynary corporations *aggregate* (k) *without confirmation*, may make leases for the like period, following the provisions of the 1 Eliz. c. 19, 13 Eliz. c. 10, and 18 Eliz. c. 11; but all ecclesiastical and eleemosynary corporations (except archbishops and bishops) may lease their houses in cities and towns, corporate boroughs, or market-towns, with not more than ten acres of land appurtenant, for forty years, subject to the provisions of the 14 Eliz. c. 11, ss. 17, 16 (l).

(g) This extends to prebendaries, chancellors, archdeacons, precentors. *Acton v. Pritcher*, 4 Leon. 51; *Watkinson v. Mann*, Cro. Eliz. 349; *Bisco v. Holt*, Lev. 112, Sid. 158. It has been doubted whether a perpetual curate is within this Act. *Doe d. Richardson v. Thomas*, 9 A. & E. 556.

(h) See sect. 4.

(i) The following are the *Disabling Statutes*:—1 Eliz. c. 19; 13 Eliz. c. 10; 14 Eliz. c. 11; 18 Eliz. c. 11; 39 Eliz. c. 5, s. 2; 1 Jac. I. c. 3. By the 43 Eliz. c. 9, s. 8, all judgments had for the intent to have and enjoy any lease contrary to the above statutes, are declared void.

(j) See Bac. Abr. tit. Leases, p. 330.

(k) Case of Magdalen College, 11 Rep. 76.

(l) Bac. Abr. tit. Leases, p. 331; *Crane v. Taylor*, Hob. 269; *Hunt v. Singleton*, Cro. Eliz. 564. The three statutes (13 Eliz. c. 10, 14 Eliz. c. 11, 18 Eliz. c. 11) are to be read together as forming one law on the same subject-matter, and where leases of houses, &c., which were exempted out of the 13 Eliz. by the 14 Eliz., do not observe

the provisions of the latter statute, they fall within the general enactments of the first statute, and are made void thereby. In other words, a lease not warranted by 14 Eliz. remains restrained by the 13 Eliz., which makes leases against that Act void. *Per Tindal, C.J.*, in *Vivian v. Blomberg*, 3 Bing. N.O. 324, 325. It is apparent from the statutes 32 Hen. VIII. c. 28, and 13 Eliz. c. 10, that the Legislature meant to confine the authority to let to lands formerly let, and capable of producing profit. *Goodtitle d. Clarges v. Hunucar*, 2 Doug. 565. As to construction of these statutes, see *Doe d. Tennyson v. Lord Yarborough*, 7 Moore, 258, S.C. 1 Bing. 24; *Moore v. Clench*, L.R. 1 Ch. D. 447; Bac. Abr. tit. Leases; 1 Platt on Leases, p. 240; and Chitty's Statutes, "Leases." A lease declared void by the 13 Eliz. has been held good during the life of the lessor, *per Bayley, J.*, in *Doe d. Bryan v. Banks*, 4 B. & Ald. 407; and even after the lessor's death such a lease is not void, but voidable, and may be confirmed by his successor, *per Holroyd, J.*, in *Edwards v. Dick*, 4 B. & Ald. 217.

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These statutes were further amended by the 39 & 40 Geo. III. c. 41, which permitted ecclesiastical corporations, sole or aggregate, to apportion the rents of land formerly demised by one lease among the several parts in which the land might be demised (*m*). The 6 & 7 Will. IV. c. 20, explained by the 6 & 7 Will. IV. c. 64, imposed certain restrictions on the renewal of leases by ecclesiastical persons.

Enabling statutes.

By the 5 Vict. c. 27 (*n*), incumbents of ecclesiastical benefices were enabled, with the consent of the bishop and patron, to lease lands (*o*) belonging to their benefices on farming leases for fourteen years, subject to certain restrictions. And by the 24 & 25 Vict. c. 105, no grant by copy of court-roll, or any lease by any future prebendary (*p*), rector, vicar-perpetual, curate, or incumbent of their lands is to be valid, unless made in conformity with the provisions of the 5 Vict. c. 27 (*q*).

By "The Ecclesiastical Leasing Act (1842)" (*r*), as amended by "The Ecclesiastical Leasing Act (1858)" (*s*), all eccle-

(*m*) See *Doe d. Shrewsbury v. Wilson*, 5 B. & A. 386; and see *Doe d. Egremont v. Williams*, 11 Q. B. 688, where the converse was the case.

(*n*) Previous to this statute all colleges, cathedrals, and other ecclesiastical or eleemosynary corporations, and all parsons and vicars, were restrained from making any leases of their lands unless under the following regulations:—1st, The leases not to exceed twenty-one years, or three lives from the making; 2d, The accustomed rent or more was to be yearly reserved thereon, respecting which the 39 & 40 Geo. III. c. 41, is particularly explanatory; 3d, Houses in corporation or market-towns might be let for forty years, provided they were not the mansion-house of the lessors, nor had above ten acres of ground belonging to them, and provided the lessees were bound to keep them in repair; 4th, Where there was an old lease, no concurrent lease could be made, unless where the old one would expire within three years; 5th, Leases might not be renewed before their expiration, unless according to the provisions of 39 & 40 Geo. III. c. 41, s. 10, and 6 & 7 Will. IV. c. 20, and c. 64;

6th, No lease could be made without impeachment of waste; 7th, All bonds and covenants tending to frustrate the provisions of the statutes 13 & 18 Eliz. were void. Woodfall, "Landlord and Tenant," 6th edit., p. 17.

(*o*) Glebe lands which have been usually let on lease by incumbents are not within the Act. *Jenkins v. Green*, 28 L. J. Ch. 822, 28 Beav. 87.

(*p*) See further 25 & 26 Vict. c. 52.

(*q*) But glebe lands which have been usually let on lease are not within the 5 Vict. c. 27. *Green v. Jenkins*, 29 L. J. Ch. 505, S. C. 20 Beav. 87. At common law, a lease by the incumbent of a benefice, in whatever terms it was framed, operated as a demise so long only as he continued incumbent, for he could not pass a greater interest. *Wheeler v. Heydon*, Cro. Jac. 328; *Price v. Williams*, 1 M. & W. 6; *Doe d. Kirby v. Carter*, Ry. & Moo. 237; *Doe d. Tennyson v. Yarborough*, 1 Bing. 24.

(*r*) 5 & 6 Vict. c. 108. This Act is not to restrain existing powers of leasing. Sect. 8.

(*s*) 21 & 22 Vict. c. 57.

siastical corporations, sole and aggregate, are enabled, *with the consent of the Ecclesiastical Commissioners for England*, and with such further consents as are therein mentioned, to grant building and repairing leases for any term not exceeding ninety-nine years (*t*); leases of running water, way-leaves, and other rights and easements, for any term not exceeding sixty years (*u*); also mining leases for any term not exceeding sixty years (*v*). All of which leases are subject to certain restrictions and conditions for the benefit of their successors; and it must be made to appear to the satisfaction of the Ecclesiastical Commissioners that such leases are for the permanent advantage of the estate before their consent is given (*w*).

By the 14 & 15 Vict. c. 104, entitled "An Act to facilitate the Management and Improvement of Episcopal and Capitular Estates for England" (*x*), ecclesiastical corporations are enabled, with the approval of the Church Estate Commissioners, from time to time, to grant mining or building leases as therein mentioned (*y*).

9. PARISH OFFICERS.

The 59 Geo. III. c. 12, s. 17, vests in the churchwardens Churchwardens and overseers. and overseers of the poor, in the nature of a body corporate, all buildings, lands, and hereditaments belonging to the parish (*z*). And this Act, its object being the proper management of parochial property, applies to those cases only where the rents are applicable solely to parochial purposes, which

(*t*) Sect. 1.

(*u*) Sect. 4.

(*v*) Sect. 6.

(*w*) 21 & 22 Vict. c. 57, s. 1.

(*x*) Amended by 17 & 18 Vict. c. 16; 17 & 18 Vict. c. 116; 19 & 20 Vict. c. 74; 20 & 21 Vict. c. 74; 22 & 23 Vict. c. 46; 23 & 24 Vict. c. 124; 24 & 25 Vict. c. 105, 131; 30 & 31 Vict. c. 143; 31 & 32 Vict. c. 111; 31 & 32 Vict. c. 114, s. 9.

(*y*) Sect. 9.

(*z*) Previous to the passing of this Act, great difficulty was experienced on the subject of leases of parish property; for although, by special custom of London, the parson and churchwardens of a parish were a corporation to purchase and demise

lands (Warner's case, Cro. Jac. 532), yet, in general, neither churchwardens nor overseers, separately or conjointly, in respect of their official capacity, had any legal interest in parish property to demise. Co. Litt. 3 a; Doe d. Grundy v. Clarke, 14 East. 488; Phillips v. Pearce, 5 B. & C. 433; Doe d. Higgs v. Terry, 4 A. & E. 274; Doe d. Hobbs v. Cockell, 4 A. & E. 478; Doe d. Norton v. Webster, 12 A. & E. 444, note (a). But before the statute, a person holding under a lease granted by parish officers, of lands belonging to the parish, was a tenant from year to year. Doe d. Higgs v. Terry, see *supra*; Doe d. Hobbs v. Cockell, see *supra*.

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are under the control of parish officers (*a*); and the terms of the statute must be strictly followed in the execution and drawing of the leases (*b*). Copyholds do not appear to be within the Act (*c*).

10. GUARDIANS.

Guardians in socage.

A guardian in socage (*d*) may make leases of the infant's land in his own name, for he has not merely a bare authority but an interest in the land descended (*e*); and a guardian by election has a similar power of leasing the estate of the infant (*f*). Such leases, if they extend beyond the time of the guardianship, may be confirmed by the infant on attaining full age (*g*).

A guardian by nurture cannot make any leases either in his own name or in the name of the infant (*h*). It is said that he may make a lease at will (*i*).

Testamentary guardians.

A testamentary guardian, or one appointed pursuant to the 12 Car. II. c. 24, ss. 8-11, is the same in interest and office as a guardian in socage (*j*). But it has been doubted whether a lease for years, made by the testamentary guardian of an infant, is not absolutely void (*k*).

A guardian appointed by the Lord Chancellor must obtain

- (*a*) *Per Parke, B., Uthwatt v. Elkins*, 13 M. & W. 777; *Allason v. Stark*, 9 Ad. & E. 255; *Att.-Gen. v. Lewin*, 8 Sim. 336. See also *Gouldsworth v. Knight*, 11 M. & W. 337; *Smith v. Adkins*, 8 M. & W. 362; *St. Nicholas, Deptford, v. Sketchley*, 8 Q. B. 394; *Rumball v. Munt*, 8 Q. B. 382; *Doe d. Edney v. Benham*, 7 Q. B. 976; *Doe d. Bowley v. Barnes*, 8 Q. B. 1037.
- (*b*) *Phillips v. Pearce*, 5 B. & C. 433; *Doe d. Landsell v. Gower*, 21 L. J. Q. B. 57; 17 Q. B. 589; *Woodcock v. Gibson*, 4 B. & C. 462.
- (*c*) *Doe d. Bailey v. Foster*, 3 C. B. 215.
- (*d*) *Bac. Abr. tit. Leases*, (1) 9. See *Crabb's Digest of the Statutes*, vol. i. p. 39.
- (*e*) *Shopland v. Ryoler*, Cro. Jac. 55-59, 1 Blac. Com. 461, Co. Litt. 87 b; *R. v. Oakley*, 10 East. 494; *Eyre v. Countess of Shaftesbury*, 2 P. Wms. 108; *R. v. Sherrington*, 3 B. & A. 714; *R. v. Sutton*, 3 A. & E. 597. See also *Wade v. Baker*, 1 Ld. Raymond, 131; *Osborn v. Carden*, Plowd. 293; *Willis v. Whitewood*, 1 Leon. 322, Keilw. 46 b.
- (*f*) 1 Blac. Com. 462; Co. Litt. 87 b; *Pitcairn v. Ogbourne*, 2 Ves. 375.
- (*g*) *Bac. Abr. tit. Leases*, (1) 9.
- (*h*) *Bac. Abr. tit. Leases*, (1) 9.
- (*i*) *Willis v. Whitewood*, Owen, 45, 1 Leon. 322; *Pigot v. Garnish*, Cro. Eliz. 678; *Bac. Abr. tit. Leases*, (1) 9.
- (*j*) *Ibid.* See 1 Blac. Com. 462; *R. v. Thorp*, Carth. 384; *Pigot v. Garnish*, Cro. Eliz. 678, 734; *Roach v. Garvan*, 1 Ves. 158.
- (*k*) *Roe d. Parry v. Hodgson*, 2 Wils. 129, 135. A devise to a person as guardian, that he may "receive set and let" for his ward, gives him an authority only, and not an interest. *Pigot v. Garnish*, Cro. Eliz. 678.

the sanction of the Court of Chancery before he can make a lease (l). CHAP. I.

II. EXECUTORS AND ADMINISTRATORS.

Executors and administrators, after they have obtained letters of administration, may, by virtue of their office, dispose absolutely of terms of years, which are vested in them in right of their testators or intestates (m). A lease by one of several executors is as valid as if made by all, and the same rule applies to administrators (n). Where a testator specifically bequeathed by will a term of years, and the executor or administrator with the will annexed assents to the bequest, and afterwards leases the same, such lease would be void, as the legal interest in the term is vested in the legatee upon such assent (o); but until then, the term remains in the executor, who can dispose of the same (p). Executors and administrators.

An infant may be appointed executor, but *if sole executor*, by the 38 Geo. III. c. 87, s. 6, he is altogether disqualified from executing his office during his minority; and administration, with the will annexed, is usually granted to the guardian of such infant, or to such other person as the Court shall think fit, until such infant attains twenty-one (q).

A married woman may be appointed executrix, but her husband has a joint-interest with her in the effects of the testator. She can, therefore, do no act as executrix or administratrix without her husband's consent. The husband is enabled by law to assume the whole administration, and to act in it to all purposes without her consent (r).

(l) See 11 Geo. IV. & 1 Will. IV. c. 65, s. 12; 19 & 20 Vict. c. 120, amended by 21 & 22 Vict. c. 77; 37 & 38 Vict. c. 33; *Rex v. Sutton*, 3 A. & E. 608; *Re James*, deceased, L. R. 5 Eq. 334. See *ante*, p. 5. Tenant for Life.

(m) 2 Wms. Executors, 878, 6th edition; *Bac. Abr. tit. Leases*, (1) 7; *Roe d. Bendall v. Summerset*, 2 Wm. Blac. 692; *Wankford v. Wankford*, 1 Salk. 302; *Hudson v. Hudson*, 1 Atk. 461.

(n) *Doe d. Hayes v. Sturges*, 7 Taunt. 217; *Simpson v. Guttridge*, 1 Mad. 609, 616.

(o) *Paramour v. Yardley*, Plowd.

539; *Young v. Holmes*, 1 Stra. 70; *Doe d. Lord Say and Sele v. Guy*, 3 East. 120; *Johnson v. Warwick*, 17 C. B. 516; *Fenton v. Clegg*, 9 Exch. 680; *Doe d. Sturgeess v. Tatchell*, 3 B. & Ad. 675.

(p) *Doe d. Maberley v. Maberley*, 6 C. & P. 126; 2 Wms. on Exors. 1275, 6th edition.

(q) 1 Wms. on Exors. 222, 6th edition; *Finch's case*, 6 Co. Rep. 63; *Prince's case*, 5 Co. Rep. 29; *Cro. Eliz.* 718.

(r) See *post*, Married Women, p. 20; *Arnold v. Bidgwood*, *Cro. Jac.* 318; *Thrustout d. Levick v. Coppin*, 2 Wm. Blac. 801.

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12. TRUSTEES OF BANKRUPTS.

Trustees of
bankrupts.

Leases could formerly be made by assignees of bankrupts, and may now be made by the trustees under the new Act (*s*).

13. PERSONS UNDER DISABILITY.

Lunatics and
idiots.

A lease executed by a person of unsound mind, in the ordinary course of affairs, is binding on him and those who represent him, unless it can be shown that the lessee had notice of the lessor's state of mind. If it can be proved that the lessee knew, or ought to have known, of the lessor's incapacity, and took advantage of it, a lease executed under such circumstances is void (*t*).

By the 16 & 17 Vict. c. 70, s. 129, the committee of a lunatic may make building and other leases; by sects. 130 and 131, he may make mining leases; by sect. 133, he may execute leasing powers of a lunatic having a limited estate; by sect. 134, he may renew leases (*u*).

And by the 15 & 16 Vict. c. 48, committees of lunatics can direct repairs and improvements upon the land of lunatics, or make allowances to tenants executing the same.

By the 36 sect. of the 19 & 20 Vict. c. 120, all powers (*v*) given by that Act, and all applications to the Court of Chancery, and consents to such applications (*w*), may be given by the committees on behalf of lunatics; but in case of a lunatic tenant in tail, no application to the Court, or consent to such application, is to be made or given by committees without the special direction of the Court.

Persons in a state
of intoxication.

A lease made by a person when deprived of his reason by drink is void, if the lessee had notice of the lessor's incapacity (*x*).

(*s*) See the 32 & 33 Vict. c. 71. s. 14, pl. 4 *post*, Part 4, c. 2, s. 2.

(*t*) *Molton v. Camrour*, 2 Ex. 487, in error, 4 Ex. 17; *Elliot v. Ince*, 7 De G. M. & G. 475, 487, 26 L. J. Ch. 821; *Beavan v. McDonnell*, 10 Ex. 184, 23 L. J. Ex. 327.

(*u*) As to disposing of undesirable leases, see sect. 127.

(*v*) See *ante*, Tenants for Life, p. 3.

(*w*) See the 37 & 38 Vict. c. 33.

(*x*) *Gore v. Gibson*, 13 M. & W. 623. See *Per Alderson, B.*, in *Molton v. Camrour*, 2 Ex. 491; *Pitt v. Smith*, 3 Camp. 33.

A lease made by a person under duress is voidable at the election of the party intimidated. Duress is defined to be where one is manifestly imprisoned or restrained of his liberty contrary to law, until he executes a deed or bond to another (y). CHAP. I.
Persons under duress.

Real estate was not forfeited on conviction for treason or felony without attainder; and persons attainted of treason or felony might, before office found, lease their lands, except as against the Crown, or the lord of whom the land is held (z). And now, by the 33 & 34 Vict. c. 23, forfeitures for treason or felony are abolished, except forfeiture consequent upon outlawry. Persons attainted or outlawed.

A convict (a), against whom judgment of death or penal servitude has been pronounced or recorded upon any charge of treason or felony, is, while subject to the Act, incapable of alienating or charging any property, or making any contract, except as thereafter provided (b).

By sects. 9 to 12, an administrator under the Act has absolute power to let, mortgage, &c., any part of the property of the convict which he shall think fit.

By sect. 18, the property reverts to the convict, except so far as is necessary for the care of the property, upon completion of his sentence or pardon, or to his representatives upon his death.

By 22 & 23 Vict. c. 21, s. 25, "When a right of entry upon lands or other hereditaments shall have accrued to Her Majesty or her successors, such right may be exercised or enforced without any inquisition being taken or office being found, or any actual re-entry being made on the premises." It would seem that "such right must be exercised or enforced," before an attainted felon would become incapable of leasing his lands. A lease or assignment of the personal estate of a felon before a conviction, if *bona fide* and for good consideration, is valid even as against the Crown (c).

(y) Knight and Norton's case, 3 Leon. 239, 2 Inst. 482; Cumming v. Ince, 11 Q. B. 112.

(z) Doe d. Evans v. Evans, 5 B. & C. 584; Doe d. Griffith v. Pritchard, 5 B. & Ad. 765.

(a) See sect. 6.

(b) Sect. 8. See sect. 30, where the convict is lawfully at large.

(c) Morewood v. Wilks, 6 C. & P. 144; Shaw v. Bran, 1 Stark R. 319; *In re Saunders v. Watson*, 4 Giff. 179, 32 L. J. Ch. 224; Perkins v. Bradley, 1 Hare, 219; Whitaker v. Wisbey, 12 C. B. 44; Chowne v. Baylis, 31 Beav. 351.

CHAP. I.
Married women.

A lease by a *feme covert* is void at common law, and no subsequent act of confirmation, after the removal of the disability, can render such a lease valid (*d*). For by marriage the free agency of the wife is suspended, and the husband acquires an immediate right to the rents and profits of her freehold estates (*e*). Without his consenting to and joining in the disposal of her lands, all conveyances by her are void at common law, and over her chattel interests (not being choses in action) the husband has the sole dominion during his life (*f*).

By the Act for the abolition of fines and recoveries (*g*), married women, being tenants in fee, in tail, or for life, or for years, may make leases by deed for any term consistent with their estates, provided the husband concurs in the deed, and the wife acknowledges it before a judge, or before two perpetual commissioners, as directed by the Act (*h*), or before a county court judge (*i*).

A married woman, who has property settled to her separate use without any restraint on alienation, is deemed in equity to be a *feme sole*, and she may dispose of it accordingly (*j*). And property acquired by a married woman under the "Married Women's Property Act, 1870" (*k*), is deemed to be property held and settled to her separate use.

Infants.

A lease made by an infant (*l*) or person under the age of twenty-one years (*m*) is voidable by him (*n*), unless it be for his benefit (*o*), upon his attaining full age, or by his heir upon his death (*p*). Generally if a contract be for the benefit of the infant it will bind him; if it be to his prejudice, it is void; but if it is not distinctly to his prejudice or for his

(*d*) Goodright *d. Carters v. Strahan*, Cowp. 201, Lofft. 763.

(*e*) See *ante*, p. 6, Husband Leasing Wife's Land.

(*f*) *Manby v. Scott*, Smith's L. C. 2; Blac. Com. 293; Co. Litt. 46 b. But see *post*, "Married Women's Property Act, 1870," Part 4, c. 2, s. 3.

(*g*) 3 & 4 Will. IV. c. 74, ss. 77-79.

(*h*) Sect. 79.

(*i*) 19 & 20 Vict. c. 108, s. 73. The lease requires enrolment in Chancery if the married woman is a tenant in tail. See *ante*, Tenants in Tail, p. 2.

(*j*) Sugden on Powers, c. 4, s. 1.

(*k*) See *infra*, Part 4, c. 2, s. 3.

(*l*) See *post*, c. 2, s. 1.

(*m*) By custom in some places an infant is of full age at fifteen to make leases that shall bind him. Co. Litt. 45 b.

(*n*) Bac. Abr. Leases; Zouch *d. Abbot v. Parsons*, 3 Burr. 1806; 4 Cruise, 74, s. 67; *per* Best, J., in *Goode v. Harrison*, 5 B. & Ald. 159; and *per* Buller, J., in *Maddon v. White*, 2 T. R. 161.

(*o*) *Ketsey's case*, Cro. Jac. 320; *Maddon v. White*; Zouch *v. Parsons*, *supra*.

(*p*) *Baylis v. Dineley*, 3 M. & S. 477; Litt. s. 547.

benefit, it is voidable at his election (*q*). In the case of a lease by an infant, it seems that the presumption is that it is for his benefit (*r*). To avoid a lease made by an infant, under which the lessee is in possession, some act of notoriety is necessary on the part of the infant upon attaining twenty-one; for instance, ejectment, entry, or demand of possession. The mere execution of a new lease to another lessee is not sufficient to divest the estate created by the first lease (*s*). The infant must elect to avoid the lease within a reasonable time after coming of age (*t*). The chief point to be attended to is, whether the lease was for the benefit of the infant, for if so, it cannot be avoided by him (*u*). And slight acts have been held to amount to a confirmation of such leases. Thus where an infant made a lease for years, and at full age said to the lessee, "God give you joy of it," this was held to be a confirmation of the lease (*v*). So where an infant makes a lease, and accepts rent after coming of age, he thereby affirms the lease (*w*), but not if the lease be invalid (*x*). So where an infant made a lease of land, and after attaining full age mortgaged the land by a deed which recited the lease, this was held to be a confirmation of the lease (*y*). A lease made by an infant cannot be avoided on that ground by an adult lessee (*z*). An infant can make a lease without rent, to try his title (*a*). The 37 & 38 Vict. c. 62 provides that no action shall be brought whereby to charge any person upon any ratification made of any contract made during infancy, whether there shall or shall not be any new consideration.

The lease of an infant, to be good, must be his own personal act, for he cannot appoint an agent. Therefore a lease made by his next friend or agent cannot bind him, nor can he ratify it after he is of full age (*b*). But an infant is bound by a lease made in his corporate capacity (*c*). Thus a lease by the king or queen regnant, whether of lands held

(*q*) *Keane v. Boycott*, 2 H. Bl. 511.

(*r*) *Baylis v. Dyneley*, *supra*; *N. W. Railway Co. v. M'Michael*, 5 Exch. 126.

(*s*) *Slater v. Trimble*, 14 Ir. Com. L. R. 342, Q. B.; *Slater v. Brady*, ib. 66.

(*t*) *Evelyn v. Chichester*, 3 Burr. 1717; *Holmes v. Blogg*, 8 Taunt. 39.

(*u*) *Zouch d. Abbot v. Parsons*; *Maddon v. White*; *Baylis v. Dineley*, *supra*; *Ex parte Grace*, 1 B. & P. 377.

(*v*) *Anon.* 4 Leon. 4; *Bac. Abr. tit. Estate, B.*

(*w*) *Ashfield v. Ashfield*, Sir W. Jones, 157.

(*x*) See *Robson v. Flight*, 4 De G. J. & S. 608.

(*y*) *Story v. Johnson*, 2 J. & C. Exch. 586.

(*z*) *Zouch d. Abbott v. Parsons*, 3 Burr. 1806; *Bac. Abr. Infants*, T. 4.

(*a*) *Zouch d. Abbot v. Parsons*, 3 Burr. 1798.

(*b*) *Doe d. Thomas v. Roberts*, 16 M. & W. 778.

(*c*) *Bro. Abr. tit. Age*, pl. 80.

CHAP. I.

in right of the Crown or of the Duchy of Lancaster, cannot be avoided on the ground of infancy (*d*).

By the 11 Geo. IV. and 1 Will. IV. c. 65, ss. 16, 17, infants are empowered to grant renewals of leases under the direction of the Court of Chancery, and the Court can direct leases of land belonging to infants when it is for the benefit of the estate (*e*).

(*d*) Case of Duchy of Lancaster, p. 3; 19 & 20 Vict. c. 120; and Dyer, 209 b, Plowd. 212 b. Guardians, *ante*, p. 16.

(*e*) See *ante*, Tenants for Life,

CHAPTER II.

OF LESSEES.

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ALL persons are capable of being lessees of demisable property; in some cases demises, however, may be avoided in respect of the persons to whom they are made (a).

1. PERSONS UNDER DISABILITY.

Idiots and lunatics may take leases for their own benefit (b). *Lunatics.* The committee of a lunatic may surrender leases and accept renewals for the benefit of the lunatic, upon certain conditions, under the 16 & 17 Vict. c. 70, ss. 113-115; and the committee, or an attorney appointed by the lord of the manor, may, by sect. 108, be admitted tenant of copyhold land on behalf of the lunatic.

Outlaws may be lessees, but leases taken by them for chattel interests are forfeited to the Crown (c). *Persons outlawed or attainted.* Persons attainted may be lessees, but their leases were forfeited to the Crown (d). But by the 33 & 34 Vict. c. 33, ss. 1, 10, forfeiture for treason or felony, except that consequent upon outlawry, is abolished, and the property of the convict vests in the administrator under the Act (e).

At common law an alien friend might take a lease of a *Allens and denizens.* house or of lands; but the estate thereby granted upon

(a) 2 Cruise Dig. 79, s. 85; *Brittain v. Cole*, 1 Salk. 395; *Bac. Kettley v. Elliot*, Cro. Jac. 320; *Abr. tit. Outlawry*, (D) 2. *Brownl.* 120, 2 Bulst. 69.

(b) Co. Litt. 2 b.

(c) *Knowles v. Powell, Owen*, 16;

(d) Co. Litt. 2 b; *Shep. Touch.*

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(e) See *ante*, p. 19.

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office found would forthwith devolve to the Crown (*f*). But an alien friend who is a *merchant* might take a lease of a house for carrying on his trade, and the Crown could not seize such lease, unless he abandoned the realm (*g*). An alien husband will not be entitled to a term vested in the wife (*h*).

By the Naturalization Act, 1870, 33 & 34 Vict. c. 14, s. 2, aliens may take and dispose of real and personal property as fully as if they were natural-born subjects (*i*).

Alien enemies cannot hold leases for any purpose whatever.

A denizen (*j*) may take lands by purchase or devise, but not by inheritance. He may therefore be a lessor or lessee (*k*).

Married women.

A *feme covert* (*l*) can take a lease, her husband's express assent not being necessary, as the estate vests till dissent. But she may avoid it after his death (*m*). If a lease be made to a husband and wife, and she agree to it, she must pay the rent, and she will be chargeable with the arrearages incurred during the coverture and for waste (*n*).

By the 1 Will. IV. c. 65, ss. 12, 15, leases to married women, under the direction of the Court of Chancery, may be surrendered and renewed as therein stated.

Infants.

Infants may accept leases, and upon attaining full age

(*f*) Co. Litt. 2 b; Shep. Touch. 235; Calvin's case, 7 Rep. 49. As to purchases by an alien in the name of a trustee, see *R. v. Holland, Styles*, 20 S.C. 1 Roll. Abr. 194, 1, 13.

(*g*) Co. Litt. 2 b; see *R. v. Eastbourne*, 4 East. 107. But on the death of the lessee the lease shall go to the Crown, and not to his executors or administrators. Co. Litt. 2 b; but see *Anon.* 1 And. 25, and *Sir Upwell Caroon's case*, Cro. Car. 8.

(*h*) *Theobald v. Duffy*, 9 Mod. 102; 2 Vin. Abr. 260.

(*i*) Sect. 5 of 7 and 8 Vict. c. 66 in effect repealed the 32 Hen. VIII. c. 16, s. 13, by which all leases of dwelling-houses or shops to an alien artificer or handicraftsman were made void. This Act was strictly construed in favour of aliens. See

Jevens v. Harridge, 1 Wms. Saund. 5th ed. 6, and notes; Co. Litt. 2 b; and *Hargrave and Butler's notes*, n 7. See *Pilkingtone v. Peach*, 2 Show. 134. *Lapierre v. M'Intosh*, 9 Ad. & E. 157; *Wootton v. Stefenoni*, 12 M. & W. 129; *Bailey v. Cathery*, 1 Dowl. N.S. 456.

(*j*) Co. Litt. 129 a; Calvin's case, 9 Rep. 25 b.

(*k*) 1 Blac. Com. 374. See 12 & 13 Will. III. c. 2.

(*l*) See *post*, Part 4, c. 2, s. 3.

(*m*) *Swains v. Holman, Hobart*, 204; Co. Litt. 3 a. See *Gaston v. Frankum*, 2 De G. & S. 561, as to a married woman's separate estate being bound for payment of the rent.

(*n*) Com. Dig. tit. *Baron and Feme*, s. 2; 2 Inst. 303; 2 Roll. 287; 1 Roll. Abr. 349, pl. 2; *Brownl.* 31; *Dyer*, 13 b.

they may affirm or avoid them (*o*). The election to avoid a lease must be made by the infant within a reasonable time after he comes of age (*p*). But it seems that an infant who has taken possession even under a lease which is disadvantageous to him, is bound, after coming of age, until he disclaims (*q*). Even during infancy the burthen of the estate may be obligatory on him (*r*), and he may be liable for the use and occupation of *necessary* lodgings suitable to his degree (*s*). If a person jointly interested with an infant in a lease obtain a renewal to himself only, and the lease prove beneficial, he shall be held to have acted as trustee, and the infant may claim the share of the benefit; but if it do not prove beneficial, he must take it on himself (*t*).

By the 1 Will. IV. c. 65, ss. 12, 15, leases to infants may, under the direction of the Court of Chancery, be surrendered or renewed in the mode therein stated.

2. CORPORATIONS.

Corporations (*u*) aggregate may be lessees (*v*). A lease, however, to a corporation sole (for instance, a lease to a bishop and his successors), on the death of the bishop will go to his executors (*w*); but by custom it may go to his successors, as in the case of the Chamberlain of London (*x*). Corporations.

One member of a corporation cannot make a lease to another member, nor can he take a lease from the corporation (*y*).

By the 1 & 2 Vict. c. 106, s. 28, spiritual persons performing the duties of any ecclesiastical office cannot take leases for occupation by themselves of more than eighty acres of land without the written permission of the bishop of the diocese. Ecclesiastical persons.

Trustees for charitable uses may take leases of land in England or Wales, if made according to the Mortmain Acts (*z*).

(*o*) *Ketsey's case*, Cro. Jac. 320; *Brownl.* 120; *Baylis v. Dyneley*, 3 M. & S. 477; *London and North-Western Railway Co. v. M'Michael*, 5 Exch. 126.

(*p*) *Holmes v. Blogg*, 8 Taunt. 35. If an infant pay money as a premium for a lease, which he avoids upon coming of age, and never derives benefit from the occupation, he cannot recover such money in an action for money had and received. *Holmes v. Blogg, supra*.

(*q*) *The London and North West-*

ern Railway Co. v. M'Michael, 5 Exch. 114, 20 L. J. Ex. 97.

(*r*) *London and North-Western Railway Co. v. M'Michael, supra*.

(*s*) *Hands v. Slaney*, 8 T. R. 578; *Lowe v. Griffiths*, 1 Scot. 458.

(*t*) *Ex parte Grace*, 1 B. & P. 376.

(*u*) See *ante*, c. 1.

(*v*) *Bac. Abr. tit. Corporations*, (E) 4.

(*w*) *Co. Litt.* 46 b.

(*x*) 2 *Bac. Abr.* 14.

(*y*) *Salter v. Grosvenor*, 8 Mod. 303.

(*z*) 9 Geo. II. c. 36; 9 Geo. IV. c. 85; 24 & 25 Vict. c. 9; 25 & 26

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Leases made in pursuance of the 31 & 32 Vict. c. 44, entitled "An Act for facilitating the acquisition and enjoyment of Sites for Buildings for Religious, Educational, Library, Scientific, and other charitable purposes," are exempt from the provisions of the Mortmain Act.

To local authorities.

The local authority under the Public Health Act, 1875, 38 & 39 Vict. c. 55, s. 175, may take on lease any lands within or without their district.

Parish officers, &c.

By the 59 Geo. III. c. 12, ss. 12, 17, churchwardens and overseers are made a corporation of a peculiar kind, and can take land on lease for the purposes of the Act (a).

Guardians of unions may, by order of the Poor-law Commissioners, and with the consent of the ratepayers, hire buildings for union workhouses, pursuant to the 4 & 5 Will. IV. c. 76, s. 23.

By the 30 & 31 Vict. c. 106, s. 13, the guardians may, with the approval of the Poor-law Board, hire or take on lease temporarily, or for a term of years not exceeding five, any land or buildings for the purpose of the relief or employment of the poor, and the use of the guardians or their officers, without any order of the said Board under seal.

By the 24 & 25 Vict. c. 125, overseers of parishes in England, whose population does not exceed 4000 persons, may, subject to the conditions, and for the purposes therein mentioned, take land on lease (b).

Vict. c. 17; 26 & 27 Vict. c. 106; s. 12; leases to trustees of public baths, 9 & 10 Vict. c. 74. As to canal and railway companies, see 21 & 22 Vict. c. 75, s. 3; 23 & 24 Vict. c. 41. As to leases of land for free public libraries, museums, see 18 & 19 Vict. c. 70, s. 18. Leases to building societies, 37 & 38 Vict. c. 42, s. 37. Leases to ratepayers for public improvements may be made pursuant to 23 & 24 Vict. c. 30. A lease cannot generally be granted to the inhabitants of a parish; see *Weekly v. Wildman*, 1 Lord Raym. 405, 407; *Abbot v. Weekly*, 1 Lev. 176; *Lockwood v. Wood* (in error), 6 Q. B. 62; *Constable v. Nicholson*, 14 C. B. N.S. 230, 32 L. J. C. P. 240. But see *The Vestry of Bermondsey v. Brown*, 14 W. R. 213 M. R.

(a) See *ante*, p. 15; *Smith v. Adkins*, 8 M. & W. 362; *Uthwatt v. Elkins*, 13 M. & W. 777; *Allason v. Stark*, 9 A. & E. 255; *Att.-Gen. v. Lewin*, 8 Sim. 366.

(b) As to leases to and by trustees of friendly societies, see 38 & 39 Vict. c. 60; industrial and provident societies, 39 & 40 Vict. c. 45,

CHAPTER III.

OF THE SUBJECT OF DEMISE.

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As a general rule, leases for life or lives, for years or at will, may be created of anything corporeal or incorporeal that lieth in livery (a) or in grant (b).

Corporeal hereditaments which consist wholly of substantial and permanent objects, such as lands and houses, &c., were, if in possession before the 8 & 9 Vict. c. 106, said to lie in livery. They are the subjects of demise; and incorporeal rights, appurtenant thereto—for instance, rights of way or other easements—will pass by a demise of the land (c).

Parts of any dwelling-house or other tenement may be demised. Where parts of a dwelling-house are let by the occupier, they are called lodgings or apartments (d); and if let furnished, the rent is deemed to issue out of the realty, and not partly out of the furniture (e).

(a) Now by the 8 & 9 Vict. c. 106, s. 2, all corporeal tenements and hereditaments are deemed to lie in grant, so far as regards the conveyance of the immediate freehold.

(b) Shep. Touch. 268; Bac. Abr. tit. Leases, (A); 2 Cruise, ss. 22-24.

(c) Skull v. Glenister, 16 C. B. N.S. 81; Dobbyn v. Somers, 13 Ir. Com. L. Rep. N.S. 293, Q. B.; Osborne v. Wise, 7 C. & P. 761; Clark v. Cogge, Cro. Jac. 170, 190; Staple v. Heydon, 6 Mod. 1, 3;

Howton v. Fearson, 8 T. R. 50, 56; Bac. Abr. tit. Offices, (H).

(d) Monks v. Dykes, 4 M. & W. 567; and see Stamper v. Sunderland, L. R. 3 C. P. 388; 37 L. J. MC. 137.

(e) Newman v. Anderton, 2 B. & P. New. R. 224; Spencer's case, 5 Co. R. 16, 1 Smith L. C. 36; Cado-gan v. Kennet, Cowp. 432; Collins v. Harding, Cro. Eliz. 606, 13 Co. R. 57; Emott's case, Dyer, 212 b. Selby v. Greaves, 37 L. J. O. P. 257. See *infra*, c. 4, s. 1, note (x).

CHAP. III.

Goods and chattels.

Goods and chattels may also be leased for years. Thus cattle and other live or dead stock may be demised, and the lessee will have the use and profit of them during the term. The interest, however, of the lessee therein differs from the interest which he has in lands. For the lessor can have no certain reversion in live animals, and though the lessee has no right to sell or destroy them or give them away, yet, if they die during the term, they become the absolute property of the lessee (*f*). So, whether they live or die, the young ones coming from them belong absolutely to the lessee as profits arising from the animals demised. In a lease of dead goods and chattels, however, if anything be added for repairing, mending, and improving thereof, the lessor shall have the improvements and additions with the things demised after the term is ended (*g*).

Incorporeal hereditaments.

Incorporeal hereditaments are rights issuing out of a thing corporate (whether real or personal), or concerning or annexed to or exercisable within the same (*h*). They lie in grant, and are usually capable of being the subjects of a demise.

Advowsons.

Advowsons may be demised (*i*). Thus, if an advowson, or tithes, or any incorporeal hereditament, is leased for years, an action of debt may be maintained for the rent agreed on (*j*). So if a vacancy occur while an advowson is leased, the lessee shall present, and if the lessee himself accepts a presentation from the lessor, it will be a surrender of his term (*k*).

Tithes.

Tithes are an ecclesiastical inheritance collateral to the land, and properly due to an ecclesiastical person (*l*).

(*f*) Bac. Abr. Leases, (A); Litt. s. 71; Collins v. Harding, Cro. Eliz. 606.

(*g*) Bac. Abr. Leases, (A). See now, however, the Agricultural Holdings Act, 1873, *post*, Appendix.

(*h*) Co. Litt. 19, 20.

(*i*) Kenney v. Langham, Cas. temp. Talbot, 144; Robinson v. Tongue, 3 P. Wms. 461. See *infra*, Tithes, 5 Geo. III. c. 17. For transfer of advowsons see 33 & 34 Vict. c. 39.

(*j*) 2 Woodd. 69; Rog. Ecc. L. 17; Co. Litt. 119 b.

(*k*) Bac. Abr. tit. Leases, (A); 2 Cruise, 22, 24; Bousher v. Morgan, 2 Aust. 404; Gybson v. Searle, Cro. Jac. 84.

(*l*) Comyn's Digest, Dimes, (A).

Although, in common parlance, tithes were often said to be *let* to the farmer, and although such arrangements were common throughout England, and were constantly carried into effect without deed, yet in point of fact these species of arrangements, made without deed, by which the tenant retained the tithes, and paid the clergyman or other tithe-owner a yearly sum, were not *leases* in the eye of the law, but mere *sales* by the tithe-owner to the terre-tenant; and the proof of this was, that if the tithe-owner found it necessary to bring an action for the stipulated sum, he declared not for rent, but for tithes sold and delivered, just in the same form in which the vendor of any

By the 5 Geo. III. c. 17 (*m*), it is enacted, that leases already made, or that shall be made, of tithes, tolls, and other incorporeal hereditaments, for one, two, or three life or lives, or for any term not exceeding twenty-one years, by ecclesiastical persons, or any other person who is enabled by statute to make leases for one, two, or three life or lives, or for any term not exceeding twenty-one years, of any lands, tenements, or corporeal hereditaments, shall be valid as against such lessors and their successors.

CHAP. III.

Common, or right of common (a profit which a man hath in the land of another, as to feed his beasts, to catch fish, to dig turf, or to cut wood), can be demised (*n*). Commons and
estovers.

The 13 Geo. III. c. 87, s. 75, empowers the lord of any manor, with the consent of three-fourths of the persons having the right of common upon the wastes and commons within the manor, at any time to demise or lease, for any term or number of years not exceeding four, any part of such wastes and commons, not exceeding a twelfth part thereof, for the best and most improved yearly rent that can be obtained by public auction. The clear net rents are to be applied to fence, drain, and otherwise improve the residue of the wastes and commons.

Estovers (*o*) (a reasonable allowance of wood, fuel, and repairs that every tenant for life may take of common right upon the land demised to him) can be leased. The grantee of house-bote or hay-bote may let it to another (*p*).

A right of way is demisable with the land to which it is ways.

other sort of goods declared. In common parlance, however, it was very usual to denominate such an arrangement a *letting of the tithes*, and indeed it did so far resemble a yearly tenancy, that, in the absence of express stipulation to the contrary, it required half a year's notice to put an end to it. Smith's *Landlord and Tenant*, p. 77. See *Goode v. Howell's*, 4 M. & W. 198; *Neale v. Mackenzie*, 2 C. M. & R. 84, S. O. (in error); 1 M. & W. 747; *Bird v. Higginson*, 2 A. & E. 696; *Thomas v. Fredericks*, 10 Q. B. 775; *Meggison v. Lady Glamis*, 7 Ex. 685.

(*m*) As to leases of tithes made before this statute, see *Shep. Touch.*

241; *Brewer v. Hill*, 2 Anst. 413; *Bousher v. Morgan*, ib. 404; *Walker v. Wakeman*, 1 Vent. 294; 2 Lev. 150 S. C. nom.; *Wakeman v. Walker*, 1 Keb. 597; *The Dean and Chapter of Windsor v. Gover*, 2 Saund. 302, 304, c (12).

(*n*) *Sury v. Brown*, Latch. 99; *Benson v. Chester*, 8 T. R. 396, 401; *Clark v. Cogge*, Cro. Jac. 170, 190; 1 *Stephen's Blackstone*, 648.

(*o*) A different thing from common of estovers, which is a right to cut wood upon the soil of a stranger.

(*p*) *Shep. Touch.* 222; Bac. Abr. tit. Leases, (A); *Clark v. Cogge*, Cro. Jac. 170, 190.

CHAP. III. legally appurtenant, and will pass without being mentioned, as will also other easements (q).

Corrodies. A corrody is a right of sustenance, or to receive certain allotments of victual and provision for one's maintenance. In lieu of which, especially when due from ecclesiastical persons, a pension or sum of money was sometimes substituted. A corrody was chargeable on the person of the owner of the inheritance in respect thereof (r). If one had a corrody for life, he might let it to another, or to the grantor himself (s).

Franchises. Franchises (t) can be demised. Thus, a fair, or a market, or a ferry, with the right of taking toll, can be demised; so also can a franchise of forest, chase, park, warren, or fishery. Where, however, the franchise is a personal immunity, no lease can be granted (u).

Tolls. So tolls can be leased (v).

Offices. Leases of offices which touch the administration or execution of justice, or the receipt of revenue, are prohibited by the 5 & 6 Edw. VI. c. 16, and the 49 Geo. III. c. 126 (w). But such offices as merely require common diligence, and may be executed by deputy without ill consequence to the public, may be leased for years (x). Also such offices as are

(q) *Osborne v. Wise*, 7 C. & P. 761; *Clark v. Cogge*, Cro. Jac. 170; *Howton v. Fearson*, 8 T. R. 50; *Sury v. Pigot*, Popham, 166; *James v. Plant*, 4 A. & E. 749; *Kooystra v. Lucas*, 4 B. & A. 830; *Morris v. Edgington*, 3 Taunt. 24; *Davies v. Sear*, L. R. 7 Eq. 427; See, however, *Thompson v. Waterlow*, 37 L. J. Ch. 495, L. R. 6 Eq. 36; *Langley v. Hammond*, 37 L. J. Ex. 118, L. R. 3 Ex. 161.

(r) 2 Blac. Com. 40.

(s) *Bac. Abr. tit. Leases*, (A); *R. v. Nicholson*, 12 East. 330; *Peter v. Kendal*, 6 B. & C. 703; *Beere v. Windebanke*, Sid. 80.

(t) Franchise and liberty are synonymous terms, and their definition is a royal privilege, or branch of the Crown's prerogative in the hands of a subject. *Finch*, L. 164.

(u) *Duke of Somerset v. Fogwell*, 5 B. & C. 875, 2 Blac. Com. 40; *Bac. Abr. tit. Leases*, (A). See *infra*, Offices.

(v) *Fairtitle d. Mytton v. Gilbert*, 2 T. R. 169, 3 Geo. IV. c. 126, 4 Geo. IV. c. 95, s. 51; *Bell v. Nixon*, 9 Bing. 393; *Pearse v. Morrice*, 5 B. & Ad. 396; *Olroyd v. Crampton*, 4 Bing. N. C. 24; *Shepherd v. Hodman*, 18 Q. B. 316; *Markham v. Stamford*, 14 C. B. N.S. 376; *Gunning on Tolls*, 140. By the 3 Geo. IV. c. 126, s. 57, all contracts or agreements for the letting of turnpike tolls, signed by the trustees, or their clerk, and the lessee or farmer, are declared to be valid. See *Markham v. Stamford*, *supra*; *Stott v. Clegg*, 13 C. B. N.S. 619, 32 L.J.C. P. 102.

(w) *Reynel's case*, 9 Co. 95 a; *Sutton's case*, 6 Mod. 57.

(x) *Hopkins v. Prescott*, 4 C. B. 578. See notes, *Chitty's Statutes*, tit. Offices, pp. 465-467; *Rex v. Lenthal*, 3 Mod. 145; *Bac. Abr. tit. Leases*, (A); *e.g.*, the offices of postmaster-general, king's printer, wardens of ports and havens, gun-founder, park-

merely ministerial in courts of justice (*y*). Dignities or honours cannot be leased (*z*). CHAP. III.

So pensions granted by the Crown, wholly or in part, in respect of future services which the recipient may be called upon to render, cannot be leased (*a*). Pensions.

Rents and annuities (*b*) can be granted by way of lease (*c*). Rents and annuities.

Whatever may be granted and parted with for ever may be leased (*d*). Thus rights of hunting, shooting, fishing, which are interests in the realty, may be leased. Mere easements in gross, however, it would seem, are not the subjects of demise (*e*). Thus in *Hill v. Tupper* (*f*), an incorporated canal company by deed granted to the plaintiff the sole and exclusive right or liberty of putting or using pleasure-boats for hire on their canal. It was held that the grant did not create such an interest or estate in the plaintiff as to enable him to maintain an action in his own name against a person who disturbed his right of putting and using pleasure-boats for hire on the canal. So in *Handcock v. Austen* (*g*), A, the owner of certain lace-machines, paid 12s. a week to B for permission to place the machines in a room in B's factory, and for free ingress and egress to the room for himself and workmen for the purpose of working and inspecting the machines. B supplied the necessary steam power for working the machines, payment for which was included in the above sum. It was held that as there was no demise to A of any part of the room, the relation of landlord and tenant was not created between him and B (*h*). Other incorporeal hereditaments.

keeper, gauger, aulnager, garbler of spices, and registrar of policies of assurance in London. See *Veale v. Priour*, Hard. 352; *Zouch v. Moore*, 2 Roll. R. 274, Hard. 354; *Bac. Abr. tit. Offices*, (H); *Com. Dig. Offices*, (B) 7.

(*y*) For instance, surveyor of the green wax, sealer of writs and sub-pœnas. *Bro. Abr. tit. Leases*, 40. (*z*) *Bac. Abr. tit. Leases*, (A).

(*a*) *Wells v. Forster*, 8 M. & W. 149; *Lloyd v. Cheetham*, 30 L. J. Ch. 640; *Dent v. Dent*, 36 L. J. P. & M. 61. (*b*) An annuity which is descendible to a man's heirs is an incorporeal hereditament. *Co. Litt. 20 a*.

(*c*) *Bac. Abr. tit. Leases*; *Thomas v. Fredericks*, 10 Q. B. 775; *Co. Litt. 144 b*; *Com. Dig. tit. Annuity*, (A) 1, (E). (*d*) *Bac. Abr. tit. Leases*. (*e*) *Hill v. Tupper*, 32 L. J. Ex. 217; *Wood v. Leadbetter*, 13 M. & W. 838; *Ackroyd v. Smith*, 19 L. J. C. P. 315; *Stockport Waterworks Company v. Potter*, 3 H. & C. 300; *Bird v. Great Eastern Railway Company*, 19 C. B. N.S. 268; *Hyde v. Graham*, 1 H. & C. 593; *Selby v. Greaves*, 37 L. J. C. P. 251. (*f*) 32 L. J. Ex. 217. (*g*) 14 C. B. N.S. 942; 32 L. J. C. P. 252. (*h*) See *Selby v. Greaves*, 37 L. J. C. P. 257; *Wright v. Stavert*, 2 E. & E. 721, 29 L. J. Q. B. 161; *Carr v. Benson*, L. R. 3 Ch. Ap. 524.

CHAPTER IV.

OF THE INSTRUMENT OF DEMISE.

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1. DISTINCTION BETWEEN LEASES BY DEED, LEASES BY WRITING NOT UNDER SEAL, AND WITHOUT WRITING.

We have seen that, as a general rule, a lease of any corporeal or incorporeal hereditament, can be created for life or lives, for years, or at will (a). But the distinction which existed between things lying in livery and things lying in grant, rendered a different mode of conveyance necessary in their alienation.

Leases by deed. The conveyance of things lying in grant (b), as remainders, reversions, and other incorporeal hereditaments, which were

(a) See *supra*, c. 3, p. 35.(b) See *supra*, c. 3, s. 1.

incapable of actual possession or transfer, was effected by grant under seal (*c*). Thus a lease in writing, not under seal, of a several fishery in a public river has been held to be void (*d*). So a lease of tithes (*e*), or of a right of way, or of a right of passage for water (*f*), or of a right to shoot over a manor, or fish in certain ponds (*g*), or the like, if not under seal, is invalid. Where, however, there is a demise of a corporeal hereditament to which an incorporeal right is appurtenant, the incorporeal right passes with the conveyance of the corporeal thing demised (*h*). Thus a right of way appurtenant to the land will pass by a parol demise of the land (*i*); or a right to dig turf (*j*), or a market with a right to take tolls made appurtenant to the land by Act of Parliament, may be demised without deed (*k*).

Leases made by the sovereign, or by corporations, or by husband and wife, must be by deed (*l*).

At common law leases of things lying in livery might have been made by word of mouth or by writing not under seal, as well as by deed. Leases not under seal.

A feoffment (*m*), or lease with livery of seisin, was formerly the usual mode of conveying freehold interests in land in possession. The livery formed the essential part of the conveyance, and a deed or charter of feoffment, or lease, although under seal, was only deemed evidence of the grant, and was not essential to its validity (*n*). Neither a feoffment nor freehold lease was effectual at common law to pass an estate unless the grantor was in possession, so as to enable him to Leases at common law.

(*c*) *Bird v. Higginson*, 2 A. & E. 696. Quære, a lease under seal should, since the passing of the Statute of Frauds, be signed?

(*d*) *Duke of Somerset v. Frogwell*, 5 B. & C. 875.

(*e*) *Gardiner v. Williamson*, 2 B. & Ad. 336.

(*f*) *Hewlins v. Shippam*, 5 B. & C. 221.

(*g*) *Bird v. Higginson*, 2 A. & E. 696.

(*h*) *Howton v. Fearson*, 8 T. R. 50, 56; *Skull v. Glenister*, 16 C. B. N.S. 81, 32 L. J. C. P. 185.

(*i*) *Ibid.* *Osborne v. Wise*, 7 C. & P. 761; *Clark v. Cogge*, Cro.

Jac. 170-190; *Staple v. Heydon*, 6 Mod. 1, 3, but see *ante*, p. 30, n. (*g*).

(*j*) *Dobbyn v. Somers*, 13 Ir. Com. L. Rep. N.S. 293, Q. B.

(*k*) *Bridgland v. Shapter*, 5 M. & W. 375.

(*l*) *Lane's case*, 2 Rep. 17; *Patrick v. Balls*, Carth. 390, S. C. Lord Raymond, 136. See *ante*, p. 30, n. (*l*), as to lease of turnpike tolls.

(*m*) See now 8 & 9 Vict. c. 106.

(*n*) Co. Litt. 9 a, 49 a, 169 a; *Sharp's case*, 6 Rep. 261, S. C.; *Sharp v. Sharp*, Cro. Eliz. 482. It would appear from *Doe. d. Warner v. Brown*, 8 East. 167, and *Brown v. Warner*, 14 Ves. 158, that leases for life must have been created by deed.

CHAP. IV.

complete the grant or demise by livery, or, if a tenant for years was in possession (o), unless he consented to the livery. Leases for years, however, are chattels real. They were originally for short terms, and conferred only a right to receive the profits of the land; but the legal seisin of the freeholder was not transferred nor disturbed, as the lessee was considered only to hold possession for the benefit of the reversioner. So, if a tenant for years was deprived of the possession, no means were provided by which he could be restored to the occupation of the soil; his only remedy was founded on the contract which constituted the lease; and the words of demise were construed as a covenant entitling the tenant to recover damages as a recompense for the loss of possession. But in the reign of Henry VIII. (p) a tenant for years was enabled to falsify a common recovery, from which time leases for long terms of years were granted, and were considered permanent interests; but the distinction between chattels real and freehold estates still continues a marked feature in the laws relating to real property (q). A lease for years, therefore, was considered simply as a contract or agreement between the lessor and the lessee for the possession (r) and profits of the lands for a determinate period, on the one side, and a recompense by rent or other consideration, on the other (s). It follows that leases for years of things lying in livery, being mere chattel interests arising from the contracts between the parties, may commence *in presenti* or *in futuro*; but until entry the lessee has no estate, though upon the making of the lease he immediately acquires an *interesse termini*, which may be granted away as a right, or extinguished by a release, but cannot be conveyed as an estate (t).

Statute of Frauds.

To remedy the evils arising from verbal demises, the Statute of Frauds was passed (u). The object of the statute

(o) 3 Dyer, 363 a, pl. 22.

(p) 21 Hen. VIII. c. 15.

(q) Bac. Abr. tit. Leases, (A); Co. Litt. 384 n (332), by Butler.

(r) By the 21 Henry VIII. c. 15, a tenant can recover possession. Bac. Abr. tit. Leases, (A).

(s) Bac. Abr. tit. Leases, (AK).

(t) Com. Dig. Estates by Grant, (G) 14; 1 W. Saund. 250 f (1); Williams v. Bosanquet, 1 B. & B. 238; Ryan v. Clarke, 14 Q. B. 65; Harrison v. Blackburn, 17 C. B. N.S. 678, 34 L. J. C. P. 109; Doe d. Rawlings v. Walker, 5 B. & C.

118, Co. Litt. 46 b, 270 a; Litchfield v. Brady, 5 Ex. 939. An *interesse termini* is that interest which the lessee has in the term, whether commencing *in presenti* or *in futuro*, before he makes an actual entry into the lands. Where indeed the term is created under the Statute of Uses, there the statute transfers the possession to the use, and no entry is necessary; consequently in such a case an *interesse termini* cannot properly speaking exist. Shep. Touch. 267 e.

(u) 29 Car. II. c. 3.

was to do away with the old method of transferring interests in land. CHAP. IV.

By sect. 1 of this statute it was enacted, that "all leases, estates, interests of freehold, or terms of years, or any uncertain interests, of, in, to, or out of, any messuages, manors, lands, tenements, or hereditaments, made or created by livery of seisin only, or by parol, and not put in writing, and signed by the parties so making or creating the same, or their agents thereunto lawfully authorised by writing, shall have the force and effect of leases or estates at will only, and shall not either in law or equity be deemed or taken to have any other or greater force or effect, any consideration for making any such parol leases or estates to the contrary notwithstanding."

"Except (*v*), nevertheless, all leases not exceeding the term of three years from the making thereof (*w*), whereupon the rent reserved to the landlord during such term shall amount unto two-third parts at the least of the full improved value of the thing demised."

And the 4th section enacts, "That no action shall be brought whereby to charge the defendant upon any *contract* or sale of lands, tenements, and hereditaments, or any interest in or concerning them, unless the agreement (*x*) upon which such action shall be brought, or some note or memorandum thereof, shall be in writing, signed by the party to be charged therewith, or some other person thereunto lawfully authorised."

The 8 & 9 Vict. c. 106, s. 3, enacts, that "a lease required by law to be in writing of any tenements or hereditaments, shall be *void at law* (*y*), unless made by deed."

(*v*) Sect. 2.

(*w*) A lease for less than three years, but with an option to the lessee to prolong it beyond three years, is within the statute, and is void if not made by deed. *Hand v. Hall*, 46 L. J. Ex. 242; but an agreement to let from year to year, and for so long as the lessor has power to let, creates only a tenancy from year to year, and may be put an end to as such, though the lessor's power to let may continue. *Wood v. Beard*, 46 L. J. Q. B. 100 L. R. 2 Ex. D. (D.C.A.) 30.

(*z*) A mere agreement to let

lodgings (see *ante*, p. 27), not amounting to an actual demise, is a contract for an interest in land within this section, and must therefore be in writing. *Edge v. Stratford*, 1 C. & J. 391; *Inman v. Stamp*, 1 Stark. R. 12. And the furniture agreed to be let therewith forms an inseparable part of the contract. *Meehlen v. Wallace*, 7 A. & E. 49; *Vaughan v. Hancock*, 3 C. B. 766. See also *Wright v. Stavert*, 2 E. & E. 721, 29 L. J. Q. B. 161.

(*y*) See *infra*, s. 3, Difference between Leases and Agreements.

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Effect of the
statutes.

Therefore, by the conjoint operation of the Statute of Frauds and the 8 & 9 Vict. c. 106, s. 3, all leases of any estate in any corporeal hereditament must be put in writing, and signed by the parties, or their agents authorised in writing; and such leases are *void at law*, unless they are made by deed. But there must be excepted leases of any estate in any corporeal hereditament for three years, or for any less term, which can still be made by word of mouth; provided such leases comply with the conditions mentioned in the 2nd section of the Statute of Frauds; and it must be borne in mind that such leases fall within the provisions of the 4th section of the Statute of Frauds, and therefore whatever other remedies may attach to them in their *character* as leases (2), no *action* can be brought upon such contracts unless there is some note in writing, signed by the party charged, or his agent, who need not be authorised in writing. Thus no action will lie on a verbal lease against the lessee for not taking possession (a).

Effect of non-
compliance
with the
Statute of
Frauds.

By the terms of the Statute of Frauds, a lease (not complying with the conditions therein named) of any estate in any corporeal hereditament, for any term, is declared to have the force and effect of *an estate at will only* (b); and so also where the provisions of the Statute of Frauds have been complied with, but the lease is not under seal, an estate in the nature of a tenancy at will is created upon entry under the written agreement for a lease.

Presumed
yearly ten-
ancy.

This estate at will (c) has been said to enure as a tenancy from year to year (d), but it is more correct to say that it may, like any other estate at will, be changed into a tenancy

(2) *Drury v. Macnamara*, 5 E. & R. 612; *Coe v. Clay*, 4 Bing. 440; *Jinks v. Edwards*, 11 Exch. 775.

(a) *Inman v. Stamp*, 1 Stark. 12; *Edge v. Stratford*, 1 C. & J. 391. But if there is a part performance, the case is taken out of the statute. Thus where at the expiration of a lease a landlord verbally agreed for a new lease, and the tenant remained in possession and expended money, *Williams v. Evans*, 44 L. J. Ch. 319, 19 L. R. Eq. 547, it was held that the statute did not apply; and see *Coles v. Pilkington*, 19 L. R. Eq. 174. It should also be observed, that there may be a verbal agreement collateral to a written lease, which may be binding on

the party making it, notwithstanding the statute. *Mann v. Nunn*, 43 L. J. C. P. 241; *Erskine v. Adeane*, L. R. 8 Ch. 756; 42 L. J. Ch. 849; *Salaman v. Glover*, L. R. 20 Eq. 444; 44 L. J. Ch. 551.

(b) Sect. 1.

(c) See *infra*, s. 5, Duration of Term as to Estate at Will.

(d) *Doe d. Rigge v. Bell*, 5 T. R. 471; *Clayton v. Blakey*, 8 T. R. 3; *Berry v. Lindley*, 3 M. & Gr. 498, per Coltman, J.; even as against a corporation, *Doe d. Pennington v. Tanieres*, 12 Q. B. 998; *Ecclesiastical Commissioners v. Merrill*, *ante*, p. 16; but see *Finlay v. Bristol and Exeter Ry. Co.*, 7 Ex. 415.

from year to year, by payment of rent after entry (e) or other circumstances indicative of an intention to create such *yearly* tenancy (f). Thus where, in an action of replevin, plaintiff entered a farm under an *oral* agreement for a lease for ten years, the rent (the amount not being mentioned) was to be paid half yearly; no lease was ever executed, but plaintiff occupied and paid a certain rent for two years; it was held that the lessor might distrain (g). Gaselee, J., said, "The agreement for a lease for ten years not having been reduced into writing, was invalid; but the plaintiff having entered and occupied for more than a year under the terms of that agreement, it is clear, according to the cases, that he was tenant from year to year."

Where payment of rent, unexplained, would ordinarily imply a tenancy from year to year, the circumstances under which such payment was made may be proved for the purpose of repelling such an implication (h).

And in all cases, in order to enlarge the tenancy at will, it must be proved that the parties expressly or impliedly agreed to a new contract for a tenancy from year to year (i).

The occupation must have been as tenant. Therefore an agent or servant, if he is allowed to occupy premises belonging to his principal or master, for the more convenient performance of his duties, acquires no *estate* therein, even though he is also allowed to use the premises for the carrying on of his own business (j). Nor does the fact that the servant receives less wages by reason of his occupation of premises for the mere performance of his duties make any difference (k).

(e) *Berry v. Lindley*, *supra*; *Lee v. Smith*, 9 Exch. 662; *Bishop v. Howard*, 2 B. & C. 100.

(f) *Braithwaite v. Hitchcock*, 10 M. & W. 494; *Cox v. Bent*, 5 Bing. 185; *Vincent v. Godson*, 24 L. J. Ch. 121, per *Cranworth*, L.C.

(g) *Knight v. Bennett*, 3 Bing. 361.

(h) *Walker v. Gode*, 30 L. J. Ex. 172; *Doe d. Lord v. Crago*, 6 C. B. 90; *Oakley v. Monk*, L. R. 1 Ex. 159; 35 L. J. Ex. 87. Ex. Ch. *The Marquis of Camden v. Battenbury*, 5 O. B. N.S. 808; *Doe d. Burne v. Prideaux*, 10 East. 158. *The Guardians of the Woodbridge Union v. The Guardians of Colneis*, 13 Q. B. 269.

(i) Thus payment of rent without the knowledge of one of several landlords is insufficient. *Doidge v. Bowers*, 2 M. & W. 365; or by person in possession without knowledge of tenant, *Doe d. Hull v. Wood*, 14 M. & W. 687; or where tenancy is expressly stated to be "at will," *Doe d. Basto v. Cox*, 11 Q. B. 122, 17 L. J. Q. B. 3; *Doe d. Dixie v. Davies*, 7 Ex. 89; *Pinhorn v. Souster*, 8 Ex. 763.

(j) *White v. Bayley*, 10 C. B. N.S. 227, 30 L. J. C. P. 253.

(k) *Bertie v. Beaumont*, 16 East. 33; *Rex v. Stock*, 2 Taunt. 339; *Mayhew v. Suttle*, 4 E. & B. 347, 357, 23 L. J. Q. B. 372, 24 ib. 54; *R. v. Shipdam*, 3 D. & R. 384; *R. v.*

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The question in such cases is, whether the occupation is that of a tenant, or merely one necessarily connected with the service of the master. Nor is the occupation of a mortgagor, in actual possession, or in receipt of the rents and profits, sufficient as between himself and the mortgagee to create a tenancy, although, for some purposes, his occupation may resemble a tenancy at will (l). Nor will an occupation under an agreement for the purchase of land create an implied tenancy from year to year, though it may create a tenancy at will (m). Moreover, the payment of rent by the occupier must have reference to a year or some aliquot portion of a year (n).

If a person under a lease void by the Statute of Frauds becomes tenant from year to year, by occupation and payment of a yearly rent, he will be considered as holding upon all the terms of his lease, and liable upon the covenants so far as they are applicable to or are not inconsistent with a tenancy from year to year (o).

Before payment of rent, and while the person who has entered is still merely a tenant at will, it seems that the terms

Bardwell, 2 R. & C. 161; R. v. Kelster, 5 M. & S. 136; R. v. Ches-hunt, 1 B. & A. 473; R. v. Snape, 6 A. & E. 278; Allan v. England, 3 F. & F. 49; Hunt v. Colson, 3 Moo. & St. 790. Where a servant, as part remuneration for his services, occupies premises of his master without paying rent, in order to ascertain whether the servant is a substantial "householder" within the 43 Eliz. c. 2, s. 1, so as to be eligible for the office of overseer of the poor, the question is whether the occupation is subservient and necessary to the service? If it is, the occupation is that of the master; if it is not, the occupation is that of a tenant, and the servant is a householder. Reg. v. Spurrell, L. R. 1 Q. B. 72, 35 L. J. M. C. 74.

(l) Birch v. Wright, 1 T. R. 382. See the judgment of Buller, J., *ex parte*, Wilson, 2 V. & B. 252; Moss v. Gallimore, 1 Smith's L. C. 470 (4th ed.); Trent v. Hunt, 9 Ex. 14; Hale v. Lord Baxley, 20 Beav. 127; Jolly v. Arbuthnot, 28 L. J. Ch. 547, 550; Walmsley v. Milne, 7 C.

B. N.S. 115, 29 L. J. C. P. 97. See *infra*, Duration of Term, p. 98.

(m) Doe d. Newby v. Jackson, 1 B. & C. 448; Kirtland v. Pounsett, 2 Taunt. 145; Hearne v. Tomlind, Peake, 192; Hope v. Booth, 1 B. & Ad. 498. See *infra*, Duration of Term, p. 98.

(n) Richardson v. Langridge, 4 Taunt. 128; Braithwaite v. Hitchcock, 10 M. & W. 497; Doe d. Hall v. Wood, 14 M. & W. 682. See the judgment of Williams, J., in The Marquis of Camden v. Battenbury, 5 C. B. N.S. 812.

(o) Doe d. Rigge v. Bell, 5 T. R. 471; Beale v. Sanders, 3 Bing. N. C. 850; Richardson v. Gifford, 1 A. & E. 52; Doe d. Thompson v. Amey, 12 A. & E. 476; Pistor v. Cater, 9 M. & W. 315. Lee v. Smith, 9 Exch. 662; so also where the tenant continued to hold under the survivor of two landlords, Arden v. Sullivan, 14 Q. B. 832; so also where the rent was raised, Geekie v. Monk, 1 C. & K. 307, 5 Q. B. 841. See also, in case of deed by corporation not under seal, Doe d. Penning-

of the agreement do not apply (*p*). A stipulation "to keep open the shop, and use best endeavours to promote the trade of it during the tenancy," is consistent with a tenancy from year to year (*q*). So is a stipulation that the tenant shall be paid for tillages on the expiration of his tenancy (*r*), and a covenant to paint at the expiration of the term (*s*). A proviso for re-entry, for non-payment of rent, or for non-performance of covenants, has been held consistent with an implied yearly tenancy (*t*). But a stipulation for two years' notice to quit is inconsistent with a tenancy from year to year (*u*). So it would seem is a covenant to build or a stipulation to do more than tenantable repairs (*v*).

Where a person has entered under a lease void by the Statute of Frauds, and has become, by implication, tenant from year to year, such tenancy may be determined by the usual notice to quit at the end of the first or any subsequent year thereof; and the tenancy will cease on the expiration of the term mentioned in the instrument, and the premises may then be recovered without any notice or demand (*w*). Thus where a tenant entered under an agreement for a lease for seven years, which was never executed, it was held that he was not entitled to notice to quit at the end of the seven years (*x*).

Where a tenant holds over under a remainder-man, paying the same rent, and no further communication passes between them, the remainder-man is not bound by a stipulation of which he knew nothing, and which is not according to the custom of the country (*y*).

The court will decree specific performance of an oral

ton *v.* Taniere, 12 Q. B. 998. But a mere assignment by a lessee will not render the assignee liable to the stipulations in the lease without some act, such as payment of rent, to raise the presumption of a new tenancy. *Elliott v. Johnson*, L. R. 2 Q. B. 120.

(*p*) See 2 Sm. L. C. 96, 5th ed.; but see per Parke, J., *Richardson v. Gifford*, 1 A. & E. 56.

(*q*) *Sanders v. Karnell*, 1 F. & F. 356.
(*r*) *Brooklington v. Saunders*, 13 W. R. 46, Q. B.

(*s*) *Martin v. Smith*, 43 L. J. Ex. 42; L. R. 9 Exch. 50.

(*t*) *Thomas v. Parker*, 1 H. & N. 669.

(*u*) *Tooker v. Smith*, 1 H. & N. 732; and see *Holmes v. Day*, 8 Ir. K. C. L. 235.

(*v*) *Bowes v. Croll*, 6 E. & B. 264.

(*w*) *Doe d. Tilt v. Stratton*, 4 Bing. 446; *Doe d. Bromfield v. Smith*, 6 East. 530; *Doe d. Davesh v. Moffat*, 15 Q. B. 257.

(*x*) *Doe d. Tilt v. Stratton*, *supra*. See *Berry v. Lindley*, 3 M. & G. 498.

(*y*) *Oakley v. Monk*, L. R. 1 Ex. 159; 35 L. J. Ex. 87 Ex. Ch.

CHAP. IV. agreement for a lease where there has been a part performance taking the case out of the Statute of Frauds (2).

It must also be borne in mind, that writings not under seal are void at law only as leases, but they are enforceable as agreements, if they can be construed to be agreements and not leases; and even if they be clearly leases, and thus void at law, the Chancery Division will decree specific performance (a).

2. RECITALS.

Recitals.

Recitals of former instruments, or of some antecedent circumstances which have led to the lease in question, are convenient for the sake of clearness and elucidation. They also explain the intention and meaning of the parties (b). As a lease by deed operates like any other deed as an estoppel, parties are generally prevented from afterwards disputing the facts therein recited (c). The question how far parties are bound by recitals in deeds has been much discussed. The doctrine of Lord Coke, that "a recital doth not conclude because it is no direct affirmation" (d), has been expressly overruled. The law on this subject has been thus stated by Parke, B., in *Carpenter v. Buller* (e):—"If a distinct statement of a particular fact is made in the recital of a bond or other instrument under seal, and a contract is made with reference to that recital, it is unquestionably true that, as between the parties to that instrument and in an action upon it, it is not competent for the party bound to deny the recital, notwithstanding what Lord Coke says on the matter of recital in *Coke Littleton*, 352 b; and a recital in instruments not under seal may be such as to be conclusive to the same extent. A strong instance as to a recital in a deed is

(2) See *post*, Div. II. ch. i. s. 3.

(a) See *post*, ch. iv. p. 50.

(b) See *Cruise's Digest*, title xxxii. Deed, c. xxi. s. 22; see *Ringer v. Cann*, 3 M. & W. 343.

(c) As to estoppel by recital, see *Salter v. Kidgley*, 1 Show. 58; *Com. Dig. Estoppel*, (A) 2; *Veale v. Warner*, 1 Saund. Wills, 325 a, n. (c); the notes to the *Duchess of Kingston's case*, 2 Smith, L. C. 656 (5th edition); *Lainson v. Tremere*, 1 A. & E. 762; *Bowman v. Taylor*, 2 A. & E. 278; *Hills v. Laming*, 9 Exch. 256; *R. v. Stamper*, 1 Q. B. 123; *Hill v. Man-*

chester and Salford Waterworks Co., 2 B. & Ad. 544; *Pargeter v. Harris*, 7 Q. B. 708; *Bayley v. Bradley*, 5 C. B. 396; *Young v. Raincock*, 7 C. B. 310; *Horton v. Westminster Improvement Commissioners*, 7 Ex. 780; *Hungerford v. Beecher*, 5 Ir. Eq. R. N.S. 417; *Pilbrow v. Atmospheric Railway Co.*, 5 C. B. 440; *Wiles v. Woodward*, 5 Ex. 557; *South-Eastern Railway Co. v. Wharton*, 31 L. J. Ex. 515.

(d) *Co. Litt.* 352 b.

(e) 8 M. & W. 212.

found in the case of *Lainson v. Tremere* (*f*), where, in a bond to secure the payment of rent under a lease, it was recited that the lease was at a rent of £170, and the defendant was estopped from pleading that it was £140 only, and that such amount had been paid. So where other *particular* facts are mentioned in a condition to a bond, as that the obligor and his wife should appear, the obligor cannot plead that he appeared himself, and deny that he is married, in an action on the bond (*g*). All the instances given in *Com. Dig. Estoppel*, (A) 2, under the head of 'Estoppel by Matter of Writing' (except one which relates to a release), are cases of estoppel in actions on the instrument in which the admissions are contained. By his contract in the instrument itself a party is assuredly bound, and must fulfil it. But there is no authority to show that a party to the instrument would be estopped in an action by the other party, not founded on the deed, and *wholly collateral* to it (*h*), to dispute the facts so admitted, though the recitals would certainly be evidence. For instance, in another suit, though between the same parties, where a question should arise whether the plaintiff held at a rent of £170 in the one case, or was married in the other case, it could not be held that the recitals in the bond were conclusive evidence of these facts; still less would matter alleged in the instrument wholly immaterial to the contract therein contained; as, for instance, suppose an indenture or bond to contain an unnecessary description of one of the parties as assignee of a bankrupt, overseer of the poor, or as filling any other character, it could not be contended that such statement would be conclusive on the other party in other proceedings between them." In *Bowman v. Taylor* (*i*) a deed recited that the plaintiff had invented certain improvements for which he had obtained a patent, and the defendant, in consideration of a license to use it, entered into a covenant, for breach of which the plaintiff sued; the defendant, by his plea, traversed the invention of the plaintiff, and such plea was held bad on demurrer. The passage from *Coke Littleton* above quoted (*j*) was cited; but the Court was unanimous in giving effect to the estoppel. "The law of estoppel," said Taunton, J., "is not so unjust or absurd as it has been too much the custom to represent. The principle is, that where a man has entered into a solemn engagement by deed

(*f*) 1 A. & E. 792.

(*g*) Roll. Abr. 873, c. 25.

(*h*) See the *South-Eastern Railway Co. v. Wharton*, 31 L. J. Ex. 515, 6 H. & N. 520.

(*i*) 2 A. & E. 278.

(*j*) 352 b.

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under his hand and seal as to certain facts, he shall not be permitted to deny any matter which he has so asserted. The question here is whether there is a matter so asserted by the defendant under his hand and seal, that he shall not be permitted to deny it in pleading? It is said that the allegation in the deed is made by way of recital; but I do not see that a statement such as this is the less positive because it is introduced by a 'whereas,'"

It would therefore appear that, in order to make a recital operate as an estoppel, there must be—(1.) A distinct statement (*k*) of some material (*l*) particular (*m*) fact; (2.) A contract made with reference to such statement. But if it is the recital by one party of a fact within his knowledge, on the faith of which the other party contracted, the latter may perhaps not be estopped. Thus in *Stronghill v. Buck* (*n*), *Patteson, J.*, said, in delivering the judgment of the Court, "When a recital is intended to be a statement which all parties to the deed have mutually agreed to admit as true, it is an estoppel upon all. But when it is intended to be the statement of one party only, the estoppel is confined to that party, and the intention is to be gathered from construing the instrument. All the cases were brought forward and considered in *Young v. Raincock* (*o*), and we have no doubt that the result of them is as above stated."

As to when a recital in a deed amounts to a covenant, see tit. Covenant (*p*).

3. WORDS OF DEMISE.

Distinction between leases and agreements.

The usual words of demise are—"demise, lease, and to farm let." But any other words which are sufficient to explain the intention of the parties, that the one shall divest himself of the exclusive (*q*) possession, and the other come into it for a determinate time—whether such words run in

(*k*) See *Kepp v. Wiggett*, 10 C. B. 35. *supra*; *Doe d. Jeffreys v. Bucknell*, 2 B. & Ad. 278.

(*l*) *Carpenter v. Buller*, *supra*.

(*m*) See *Rolle's Abrg. Estoppel*, (P), pl. 1 & 7; *Com. Dig. Estoppel*, (A) 2; *Salter v. Kidley*, 1 Show. 59; *Rainsford v. Smith*, *Dyer*, 196 a, note; *Stroud v. Willis*, Cro. Eliz. 762. See judgment of Lord Denman in *Lainson v. Tremere*,

(*n*) 14 Q. B. 787.

(*o*) 7 C. B. 310.

(*p*) *Post*, s. 7.

(*q*) See *R. v. Morrish*, 32 L. J. M. C. 245; *Taylor v. Caldwell*, 32 L. J. Q. B. 164, 3 B. & S. 826; *Handcock v. Austin*, 32 L. J. C. P. 252, 14 C. B. N.S. 429.

the form of license (*r*), covenant (*s*), or agreement (*t*)—are of themselves sufficient, and will, in construction of law, amount to a lease for years, as effectually as if the most proper and pertinent words had been used for the purpose (*u*). Thus a license to enjoy or inhabit a house has been deemed a demise of it (*v*). So if A, by articles, covenant with B that he shall have, hold, or enjoy certain lands for a certain time, this amounts to a lease; but if A covenant with B that C shall have, hold, or enjoy them, it is otherwise (*w*). So where the owner of the fee agreed to convey the premises to B for a certain number of years, at a certain rent, and the instrument contained the usual covenants for payment of rent, &c., this was holden to be a lease (*x*). So where A *agreed to let, &c.*, it was holden to be a present demise (*y*). So where B agreed “to pay the sum of £140 per annum, in quarterly payments, for the house and premises at, &c., for the term of seven, fourteen, or twenty-one years, at his option, at the end of every seven years, the rent to commence on the 1st January 1827,” this was held to be a lease (*z*). A stipulation that a lease shall be afterwards drawn up between the parties, does not of itself indicate an intention that the instrument should not operate as a present demise, but merely that a more formal instrument should thereafter be executed by them, to effectuate the same thing, as being more satisfactory than the present instrument. Therefore, where by articles between A and B, it was covenanted and agreed that A “*doth let*” certain lands to B, for five years from Michaelmas then next, at a certain rent; and it was also covenanted that a lease should be made and sealed, according to the effect of these articles, before the Feast of All Saints; this was holden to amount to an immediate lease, by reason of the words “*doth*

(*r*) *Hall v. Seabright*, 1 Sid. 428, 2 Keb. 561; *Jepson v. Jackson*, 2 Lev. 194; *Trevor v. Roberts*, Hard. 366; *R. v. Winter*, 2 Salk. 388; *Watkins v. Overseers of Milton*, L. R. 3 Q. B. 350, 37 L. J. M. C. 73; *Grant v. Oxford Local Board*, L. R. 4 Q. B. 9; *Carr v. Benson*, L. R. 3 Ch. App. 524. For the distinction between leases and licenses, see *post*, p. 50.

(*s*) *Drake v. Monday, W. Jones*, 231, Cro. Car. 207; *Right d. Green v. Proctor*, 4 Burr. 2208; *Right d. Bassett v. Thomas*, 3 Burr. 1441; *Whitlock v. Horton*, Cro. Jac. 91; *Jones d. Trimleston v. Inman*, Irish T. R. 433; *Doe d. Pritchard v. Dodd*, 5 B. & Ad. 689; *Richards v. Sely*, 2 Mod. 79; *Haverhill v. Hare*, 3 Bulst. 252.

(*t*) See *infra*.

(*u*) *Bac. Abr. tit. Lease*, (K). See *Wilkinson v. Hall*, 3 Bing. N. C. 532; *Neale v. Mackenzie*, 1 M. & W. 759.

(*v*) *Bac. Abr. tit. Lease*, (K); 1 Leon. 129.

(*w*) *Bac. Abr. tit. Lease*, (K); *Drake v. Monday*, Cro. Car. 207; *Tisdale v. Essex*, Hob. 34; *Doe d. Jackson v. Ashburner*, 5 T. R. 163.

(*x*) *Alderman v. Neat*, 4 M. & W. 704.

(*y*) *Staniforth v. Fox*, 7 Bing. 590.

(*z*) *Wright v. Trevežant*, M. & M. 231, 3 C. & P. 441.

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let," in the present tense, and that the covenant for a future lease was only for further assurance; and the rather, in this case, as the time at which the future lease was to be executed was after the commencement of the term (a). So where A and B entered into an agreement with C, whereby they agreed "with all convenient speed to grant to him a lease of, and they did thereby set and let to him," certain premises, for a certain term, at a certain rent, the lease to contain certain covenants, in stipulating for one of which the words "this demise" occurred, the Court held this to be a good lease *in presenti*, with an agreement to execute a more formal and perfect lease *in futuro*; the operative words of demise, "set and let," being in the present tense, made it a demise; and the word "demise," in the stipulation as to the covenants, showed that the parties intended it to be so (b). So where, by an instrument in writing, A agreed to let, and B agreed to take, a certain piece of land, for a certain term, at a certain rent; and in consideration of a lease to be granted for the said term, B agreed to lay out £2000, within four years, in building certain houses upon it, and A agreed to grant a lease, or leases, as soon as the houses should be covered in, and B agreed to take such leases, and to execute counterparts, the agreement to be considered binding till one fully prepared could be produced; the Court held this to be a lease (c). Lord Ellenborough, C.J., in giving judgment, said—"The rule to be collected from all the cases is, that the intention of the parties, as declared by the words of the instrument, must govern the construction; and here their intention appears to have been, that the tenant, who was to expend so much capital upon the premises within the first four years of the term, should have a *present legal interest* in the term, which was to be binding upon both parties; though when a certain progress should be made in the buildings, a more formal lease, or leases, in which, perhaps, the premises might be more particularly described, for the convenience of underletting or assigning, might be executed." So where A agreed to grant, seal, and execute to B "a legal and effectual

(a) *Harrington v. Wise*, Cro. Eliz. 486, Noy. 57. See *Barry v. Nugent*, cited in *Doe v. Ashburner*, 5 T. R. 165; *Doe v. Groves*, 15 East. 244; *Goodtitle v. Way*, 1 T. R. 735. The earliest case upon this point arose before the Statute of Frauds, upon these words, "I will you *shall have* a lease for twenty-one years of my lands in D, paying ten shillings yearly rent: *make a*

lease in writing and I will seal it." This was held to be a valid lease. Moor. pl. 31; 3 Edw. VI. S. C. cited as *Maldon's case*, Cro. Eliz. 33.

(b) *Baxter v. Brown*, 2 W. Bl. 973.

(c) *Poole v. Bentley*, 12 East. 168. See also *Warman v. Faithful*, 5 B. & Ad. 1042; *Alderman v. Neat*, 4 M. & W. 704; *Chapman v. Bluck*, 4 Bing. N. C. 187.

lease" of certain premises, for a certain term, from a day then past, at a certain rent, and to contain certain covenants, and, in the meantime, until such lease should be executed, B was to pay rent and to hold the premises subject to the covenants above-mentioned; this was holden to be an actual demise, and not merely an agreement. No doubt the parties intended that a more formal contract should be executed; but as the tenant was to hold, in the meantime, on certain terms there set out, this was deemed to be an intermediate demise of the premises on those terms (*d*). By a "memorandum of agreement," between A and B, after reciting that A and C had abandoned the annexed contract for taking and letting certain land (and which contract was in effect a lease), it was agreed that A should let and B should take the same lands upon the conditions contained in the annexed contract, "the said rent to be paid by quarterly payments, and to be in amount £220; and we further bind ourselves, each to the other, to execute a similar agreement to the one recited and referred to." This agreement was stamped as a lease, but the one annexed to it had no stamp. The Court held that the stamped agreement incorporated the unstamped one, and that the two together might be given in evidence as a lease (*e*). So where the instrument was as follows:—"September 21, 1829.—K. agrees to let and P. to take a house in its unfinished state, for the term of sixty years, at the rent of £525, payable quarterly, the first payment for the half-quarter at Christmas next,—P. to insure the premises, and to have the benefit of an insurance lately paid,—a lease and counterpart to be prepared at the expense of P., and to contain all the clauses, covenants, and agreements which K. entered into in the lease granted to him;" this was held to be an actual lease, and not a mere agreement for a lease (*f*), for several reasons:—First, the stipulation for a future lease was not executory merely, because the terms of it were ascertained, for it was to contain all the clauses in the lease granted to K. Secondly, although no precise day was fixed for the commencement of the rent, yet the tenant was to do the repairs, and, at Christmas following, to pay half a quarter's rent. Thirdly, the express words were, "agrees to let, and agrees to take;" and upon these the party was put into immediate possession. Fourthly, the tenant was to put the premises into repair; and, lastly, he was to insure (*g*).

(*d*) *Pinero v. Judson*, 6 Bing. 206; *Wilson v. Chisholm*, 4 C. & P. 474. *Rollason v. Leon*, 7 H. & N. 73; 31 L. J. Ex. 96; *Anderson v. Midland Railway Company*, 30 L. J. Q. B. 94; 3 E. & E. 614.

(*e*) *Pearce v. Cheslyn*, 4 A. & E. 225.

(*f*) *Doe v. Ries*, 8 Bing. 178, S. P.; *Hancock v. Caffyn*, 8 Bing. 358.

(*g*) See the judgment of Tindal, C.J., p. 181.

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But it is also laid down in Bacon's Abridgment (*h*), that "if the most proper and authentic words or form of words, whereby to describe and pass a present lease for years, are made use of, yet if upon the whole deed there appears no such intent, but that they are only preparatory, and relate to a future lease to be made, the law will rather do violence to the words than break through the intent of the parties." Therefore, if the instrument contain an express stipulation that it shall not be deemed or taken to be a lease or actual demise, it is clear that it must be deemed an agreement merely, and not a lease (*i*). Thus, where a party agreed that, in case he should become entitled to certain copyhold premises on the death of another, he would immediately demise them to J. S., this was held to be an agreement only, and not a lease (*j*). So where an instrument contained a stipulation, that out of the rent mentioned a proportionate abatement should be made in respect of certain excepted premises, it was held that the parties intended to execute an agreement only; for until the rent should be apportioned, the lessor could not distrain for it (*k*). Thus in *Doe d. Jackson v. Ashburner* (*l*), where the words were, "Articles of agreement between S. and J., entered into in regard to his fulling-mills, &c. . . . that the said mills, &c., . . . he *shall enjoy*, and I engage to give him a lease in, for the term of thirty-one years, from Whitsuntide 1784, at the clear yearly rent of £110;" the instrument was held to be only an agreement for a lease. Lord Kenyon in his judgment said, "Here the words are, 'he shall enjoy and I engage to give him a lease,' &c. And the single question is, what was the intention of the parties using those expressions? Was it that this agreement should confer the legal interest? or was it not in their contemplation that there should be another instrument to give that legal interest? The latter words clearly show that it was the intention of the parties that there should be some further assurance. It was *in fieri* at that time. . . . All the cases cited may be answered by the observation that there were either express words of present demise, or equivocal words, accompanied with others, to show the intention of the parties that there should not be a future lease; but in this case, where the context, in which I find the words 'shall enjoy,' imports that the parties do not mean that they should operate as a present demise, I think we should decide contrary to the intention of

(*h*) Tit. Leases, (K).

(*i*) *Perring v. Brook*, 7 C. & P. 360, 1 Moo & R. 510.

(*j*) *Doe v. Clare*, 7 T. R. 739.

(*k*) *Morgan v. Bissell*, 3 Taunt. 65.

(*l*) 5 T. R. 163.

the parties if we were to determine that they should have that effect." So where there were words of present demise, but the amount of rent, the periods of payment, and other terms of the holding were not mentioned, except as they were to be contained in a lease, which was to be prepared; this was held to be an agreement only, and not a lease (*m*). So an agreement "to let," with a purchasing clause, the tenant to enter any time on or before February 11, 1820, was held to be an agreement, and not a lease (*n*). Bayley, J., in giving judgment, said (*o*)—"In the case of *Morgan v. Bissell* (*p*), the rule is laid down thus, that although there are words of present demise, yet if we can collect on the face of the instrument the intent of the parties to give a future lease, it shall be considered an agreement only." So where by the instrument the rent was to be fixed by valuation, and the tenant was to find sureties for the payment of it, the Court held that it was not a lease, but an agreement only (*q*). So where a person proposed by letter to take a lease of a mine at a certain royalty and rent, the term to be about forty years from the 24th June then next, to which the other party by letter answered that he agreed to the terms, and should be happy to grant a lease conformable thereto; these letters were held to constitute an agreement only, and not a lease, because the matter was altogether *in futuro*, and much remained to be done (*r*). So where A by an instrument in writing agreed to grant at the time thereafter mentioned a lease of certain premises to B for fifty-nine years from the 28th March then last past, at a certain rent, payable quarterly, and B agreed to accept and take the lease and execute a counterpart, and in a subsequent part of the instrument it was stipulated *that the lease thereby agreed to be granted should be granted immediately after A should obtain a lease of the premises from C*, to which he was entitled under a certain agreement; the Court held that this could not be deemed a lease, as the parties knew that there was no power to grant one (*s*). So where the instrument stated that the party was "contented to demise," &c., it was held that the word "contented" imported merely approbation of something to be done thereafter, and that the instrument therefore was not to be deemed a lease, but an agreement only (*t*). In *Brashier v. Jackson*

(*m*) *Chapman v. Towner*, 6 M & W. 100; *Clayton v. Burtenshaw*, 5 B. & C. 41.

(*n*) *Dunk v. Hunter*, 5 B. & A. 322.

(*o*) *Ibid.* 326.

(*p*) 3 Taunt. p. 71, per Mansfield, C.J.

(*q*) *John v. Jenkins*, 1 C. & M. 227.

(*r*) *Jones v. Reynolds*, 1 Q. B. 506, 1 Gale & D. 62.

(*s*) *Hayward v. Haswell*, 6 Ad. & E. 265.

(*t*) *Pleasance v. Higham*, 2 Mod. 81.

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(*u*), where a party agreed to grant a lease of premises for a certain term, at a certain rent, to be entered upon immediately, such lease to contain certain covenants, and all other usual and reasonable covenants; this was held to be an agreement, and not a lease; for what were reasonable covenants might be matter of dispute between the parties (*v*). So where by a written instrument A agreed to grant to B a lease of certain premises for seven years, at a certain rent, the lease to contain certain covenants, but at the end of the instrument there was a memorandum that B should have the option of having the lease for fourteen years; this was held to be an agreement, and not a lease (*w*). So where A agreed to grant B a lease of certain premises, for a certain term from the 25th of December then next, at a certain rent, the covenants to be the same as in a former lease of the same premises, and it was stipulated that until such lease should be granted, it should be lawful for A to distrain for the rent; this was held to be an agreement only, for if the parties intended that it should operate as a lease, the latter stipulation as to the power of distress would have been unnecessary (*x*). So where A agreed that he would grant B a lease of certain premises for fourteen years from the 25th December then last past, at £40 a year; but if B should pay him £40 before the end of the first quarter, then the rent should be reduced to £35; this was held not to be a lease (*y*).

The result, therefore, to be collected from the preceding decisions is, that an instrument containing words of present demise shall operate as a lease for years; a demise is thereby created, and a mere additional stipulation for the future execution of a formal lease is considered only in the nature of an agreement for further assurance. The intention of the parties is to be collected from the words of the instrument in the first place; but if the terms of the instrument be ambiguous, the nature of the estate and the acts of the parties may be resorted to as a guide.

The interpretation of instruments of this nature has, however, been affected by the 8 & 9 Vict. c. 106, s. 3, which

(*u*) 6 M. & W. 549.

(*v*) See *Morgan v. Bissell*, 3 Taunt. 65; *Goodtitle v. Way*, 1 T. R. 735. See also *Alderman v. Neat*, 4 M. & W. 704; *Baxter v. Brown*, 2 W. Bl. 973.

(*w*) *Rawson v. Eike*, 7 A. & E. 451.

(*x*) *Bicknell v. Hood*, 5 M. & W. 104.

(*y*) *Hegan v. Johnson*, 2 Taunt. 148. An agreement for a composition in lieu of tithes cannot be deemed a lease, for nothing is thereby demised. *Brewer v. Hill*, 2 Anst. 413.

enacts that a lease *required by law* (z), to be in writing, of any tenements and hereditaments made after 1st October 1845, is "void at law" unless it be by deed. But although it is void as a *lease*, yet it may operate as an agreement for a lease. In construing written instruments, purporting to demise corporeal hereditaments for a term required by law to be in writing under seal, the Courts have usually considered that such instruments (although in terms leases, and therefore void at law) may operate as agreements (a) for leases (b). At any rate, if a person is let into possession under an instrument void as a lease, and pays rent, that instrument may be used as evidence of the terms of the holding and the amount of the rent (c).

So in *Rollason v. Leon* (d), Bramwell, B., said, "I confess I have always thought that the case of *Stratton v. Pettit* (e) was not rightly decided, and I should like to see it reviewed in a Court of Error. I think that case was wrong, on the ground that the judgment was based on reasoning inapplicable to the case of instruments made since the statute 8 & 9 Vict. c. 106. Before that statute parties might equally as well be supposed to contemplate a present actual demise as a prospective demise; but since the statute, when they cannot let for a period exceeding three years, except by deed, they may very reasonably be supposed, when they do not agree by deed, in using the words, '*agree to let*,' to mean what they actually say, and not an absolute lease."

(z) See *supra*, p. 35.

(a) It must be an agreement in conformity with the 4th section of the Statute of Frauds. See *ante*, pp. 36-39.

(b) *Bond v. Rosling*, 30 L. J. Q. B. 227, 1 B. & S. 371; *Rollason v. Leon*, 31 L. J. Ex. 96, 7 H. & N. 73; *Tidey v. Mollett*, 33 L. J. C. P. 235, 16 O. B. N.S. 298, overruling *Stratton v. Pettit*, 24 L. J. C. P. 182, 16 C. B. 420.

(c) *Tress v. Savage*, 4 E. & Bl. 36; *Arden v. Sullivan*, 14 Q. B. 832. Thus in *Lee v. Smith*, 9 Ex. 663, it was held that the agreement not being under seal, was void as a lease; but *Martin, B.*, stated it to be his impression that it might be referred to for the purpose of seeing what the terms of

the tenancy were; and *Parke, B.*, stated that he did not dissent from that proposition.

(d) 31 L. J. Ex. 96; 7 H. & N. 73.

(e) 24 L. J. C. P. 182; 16 C. B. 420. In that case (overruled by *Tidey v. Mollett, supra*), by articles of agreement in writing, dated the 3d April 1854, plaintiff agreed to let, and defendant agreed to take, certain premises for the term of five years, and the defendant to purchase the same at the end of five years, yielding to the plaintiff, as well for the rent for the five years, as for the purchase, £70. The Court held that the intention of the parties, as declared by the words of the instrument, was to create a lease, but as it was not by deed, it was void.

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So in *Tidey v. Mollett* (*f*), Erle, C.J., said, "I think the writing upon which this case turns is an agreement. The judges of this country were at one time not disposed to look upon writings such as this as agreements, but wishing to escape from the Statute of Frauds, they held them to be leases. Now, however, since the statute of 8 & 9 Vict. c. 106, making leases not under seal void, it has been the practice, for a very similar reason to that which existed before, to hold them to be agreements."

Again, such instruments being void as leases, may, it seems, be considered as agreements, so that the Chancery Division would enforce specific performance. Thus, in *Taswell v. Parker* (*g*), where an instrument void at law as a lease was sought to be enforced in equity, the Lord Chancellor (Lord Chelmsford), on appeal, in affirming the decree for specific performance made by Vice-Chancellor Stuart, says, "The Legislature appears to have been very guarded in language, for it uses the expression *shall be void at law*—that is, as a lease. If the Legislature had intended to deprive the document of all efficacy, it would have said that the instrument shall be void to all intents and purposes. There are no such words in the Act. I think it would be too strong to say, that because it is void as a lease, it cannot be used as an agreement enforceable in equity, the intention of the parties having been that there should be a lease, and the aid of equity being only invoked to carry that intention into effect" (*h*).

Distinction
between leases
and licenses.

Where the intention of the parties, as expressed in the instrument, is that the one shall divest himself of the exclusive possession of the subject-matter, and the other come into it for a determinate period, that is a lease (*i*). But if the intention of the parties is that the instrument should operate as a mere license, and that exclusive possession should not be given, then it is not a lease, although it may contain the usual words of demise (*j*).

A license, determined by a month's notice, to fasten boats to moorings, on payment towards the expenses of maintain-

(*f*) 33 L. J. C. P. 235; 16 C. B. N.S. 298; see also *Anderson v. The Midland Railway Co.* 30 L. J. Q. B. 94.
(*g*) 2 De G. & Jon. 559.
(*h*) See *Davis v. Jones*, 17 C. B. 625.
(*i*) Reg. v. Morrish, 32 L. J. M. C. 245.
(*j*) *Taylor v. Caldwell*, 3 B. & S. 826; 32 L. J. Q. B. 164; *Hancock v. Austin*, 14 C. B. N.S. 634; 32 L. J. C. P. 252.

ing the moorings of the annual sum of £30, does not amount to a demise (*k*). CHAP. IV.

A liberty to take ore in a particular tract of country, and pay £25 a year rent for it, does not amount to a lease (*l*); and so also of a license to shoot (*m*), or to exercise a right of way (*n*). But where the words used in the agreement show an intention to give exclusive possession, there a tenancy will be created (*o*).

The distinction between a lease and a mere agreement or license was formerly of considerable importance, in consequence of the different stamp which the instrument required according as it fell within the one class or the other. By the 23 Vict. c. 15, however, the stamp upon an agreement for a lease, for any term not exceeding seven years, was the same as for a lease; and now, by the 33 & 34 Vict. c. 97, s. 96, the term is extended to thirty-five years. In future, therefore, leases, and not mere agreements, will be made. As to stamps, see *infra*, s. 12.

4. PARCELS DEMISED.

The tenements or parcels intended to be demised are next specified. They should be described with a reasonable degree of accuracy. Farming leases, after setting out the names or denominations and boundaries of the subject of the demise, usually refer to the occupation of the preceding tenant, and state the name by which the farm is known. The extent of land which general words inserted in a lease embrace depends on the object and intention of the parties, to be collected from the instrument (*p*). The parcels demised.

The rule is, that whatever constitutes the essence of the thing granted, or is parcel of it, will pass with it, although it be accidentally severed at the time of the lease. Therefore,

- (*k*) *Watkins v. Overseers of Milton*, L. R. 3 Q. B. 350; 37 L. J. M. C. 73; *Grant v. Oxford Local Board*, L. R. 4 Q. B. 9. See *Hill v. Tupper*, 2 H. & C. 121; 32 L. J. Ex. 217; *Stockport Waterworks Co. v. Potter*, 3 H. & C. 300.
- (*l*) *Ward v. Day*, 4 B. & S. 337; 5 Id. 359; 33 L. J. Q. B. 3; *ib.* 254; *Carr v. Benson*, L. R. 3 Ch. Ap. 524.
- (*m*) *Bird v. Great Eastern Railway Co.*, 19 C. B. N.S. 268. See *Hooper v. Clark*, 8 B. & S. 150; L. R. 2 Q. B. 200.
- (*n*) *Wood v. Leadbitter*, 13 M. & W. 838; *Hyde v. Graham*, 1 H. & C. 593.
- (*o*) *Roads v. Churchwardens of Trumpington*, L. R. 6 Q. B. 56; 40 L. J. M. C. 35.
- (*p*) See *Doe d. Meyrick v. Meyer*, 2 Cr. & J. 223; *Maitland v. Mackinnon*, 32 L. J. Ex. 49, 1 H. & C. 607; *Hall v. Lund*, 32 L. J. Ex. 113.

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by the lease of a mill, the millstone passes, though severed at the time; and by the lease of a house the door-keys, &c., pass, although by accident they may not be in their places when the lease is made (*g*).

The word "land" will, unless a contrary intention is shown, be sufficient to pass, not only the soil, but all that grows or is built upon its surface, together with all that lies below it; but in general the particular subjects of demise are specified (*r*). A "farm" includes the farmhouse and buildings, and the lands usually occupied therewith. A *grange* includes not only barns, but stables and outhouses used for the purpose of husbandry (*s*).

In some cases a grant of the *produce* of the soil will pass the soil itself; thus *pasture* will be taken not only as the *feeding on the land*, but as the land itself; and so the grant of a *wood* will pass the soil as well as the timber (*t*). And it would appear that a lease of the "issues and profits" of land would pass the land itself; for to have the issues and profits is the same thing as to have the land itself (*u*). If a grant be made of a "boilery of salt," the land passes, for that is the whole profit (*v*). By the grant of a forest, park, chase, or warren, the soil will not pass unless the context indicates that these words are intended to pass it (*w*). The grant of a sheep-walk or a fold-course may include the soil by custom of the country (*x*). The lease of a fishery of a pond, with the spear-sedge, and the flags and the rushes growing in and about the same, has been held to pass the soil (*y*). If garden ground be let for years, and the lessee demise part of the term to an under-tenant, who builds upon it, by a grant of the garden ground the buildings thereon will pass (*z*). Where an annual sum was payable as tenant's damages, besides a way-leave rent for a coal railway passing through a farm, it was left to the jury to say whether the land covered by the railway passed by the agreement of

(*g*) See *Shep. Touch.* 89, 90, 246.

(*r*) *Co. Litt.* 4 a; *Burton v. Brown*, *Cro. Jac.* 648.

(*s*) See the various tenements accurately described, *Co. Litt.* 4, 5.

(*t*) *Co. Litt.* 4 b. *Lee Leigh v. Heald*, 1 B. & Ad. 622.

(*u*) *Parker v. Plumber*, *Cro. Eliz.* 190.

(*v*) *Co. Litt.* 4 b.

(*w*) *Beauchamp v. Winn*, 38 L. J. Ch. 556; L. R. 4 Ch. 562, com-

menting upon *Co. Litt.* 5 b (*b*). A grant may be made of a limited right of warren, as, for instance, a "warren of conies." *Beauchamp v. Winn*, *supra*.

(*x*) *Huddleston v. Woodroffe*, 2 Roll. R. 61.

(*y*) *Rex v. Old Alresford*, 1 T. R. 358.

(*z*) *Burton v. Brown*, *Cro. Jac.* 648.

letting to the tenant; because, if it did, the tenant, and not the landlord, was entitled to the sum payable as tenant's damages (*a*). A "messuage" is synonymous with dwelling-house, though more comprehensive (*b*), and will include adjacent buildings, orchard, and curtilage (*c*). The word "house," it seems, would comprise all that would pass by a grant of a messuage (*d*). The word "tenement" extends to everything that may be holden, and includes not merely land, but every inheritable right issuing out of, annexed to, or exercisable in land, such as advowsons, tithes, rents, &c. (*e*); but in leases it is commonly used in a restricted sense, as applicable only to houses and buildings. The word "hereditaments" extends not only to lands and tenements, but to some of the subjects of inheritable personal property, such as heirlooms (*f*). The word "premises" is very often introduced into leases, both as a term of reference and as a term of description; when used as a term of reference, it includes not only the parcels demised, but also the term granted (*g*).

It is a general rule in the construction of deeds that where lands are described (*h*) with sufficient certainty, as by giving a particular name to a close, the addition of an allegation mistaken or false respecting it, as, for instance, in the name of the late occupier (*i*), or in the number of acres (*j*), or in the abutments (*k*), or parish (*l*), or describing the premises as freehold instead of leasehold (*m*), or other mere misdescrip-

(*a*) *Wilson v. Anderson*, 1 C. & K. 544.

(*b*) *Doe d. Clements v. Collins*, 2 T. R. 502, *per* Ashurst, J.

(*c*) *Fenn v. Grafton*, 2 Bing. N. C. 617; *Shep. Touch.* 94.

(*d*) See the cases cited in "*Hodges on Railways*," 200-204, as to the interpretation put by the Courts on the words "house or manufactory" in the 92d sect. of the Lands Clauses Consolidation Act, 8 & 9 Vict. c. 18. Consult also Hargr. note 21 to Co. Litt. 5 b; *Chard v. Tuck*, 3 Leon. 214; *Carden v. Tuck*, Cro. Eliz. 89 S. O.; *Smith v. Martin*, 2 Saund. 400, note 2; *Steele v. Midland Railway Co.*, L. R. 1 Ch. Ap. 275.

(*e*) Co. Litt. 6 a, 20 a; *Gully v. Bishop of Exeter*, 4 Bing. 295.

(*f*) *Lord Stafford v. Buckley*, 2 Ves. Sen. 170; *Taylor v. Martindale*, 12 Sim. 158.

(*g*) *Onsley v. Fisk*, 1 And. 236; *Jerman v. Orchard*, Skin. 528.

(*h*) *Doe d. Beech v. Lord Jersey*, 1 B. & Ald. 550, 3 B. & C. 870.

(*i*) *Field v. Beaumont*, 1 B. & Ald. 247; *Welby v. Welby*, 2 Ves. & B. 191; *Pullin v. Pullin*, 3 Bing. 47; *Swift v. Eyres*, Cro. Car. 546, W. Jones, 435, Roll Abr. 52, *Graunts*, pl. 26, 27; *Trapp's case*, 3 Leon. 235; *Windham v. Windham*, 3 Dyer, 376; *Chamberlaine v. Turner*, Cro. Car. 129; *Blake v. Gold*, W. Jones, 379, Cro. Car. 447.

(*j*) *Lord Willoughby v. Foster*, 1 Dyer, 80 b.; *Com. Dig. tit. Falt*, (E) 4.

(*k*) *Roberts v. Karr*, 5 Taunt. 501.

(*l*) *Lambe v. Reaston*, 5 Taunt. 207; *Robinson v. Button*, 2 Roll Abr. 52, *Graunts* P. pl. 21.

(*m*) *Doe d. Dunning v. Cranstoun*, 7 M. & W. 1.

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tion (n), will not avoid the instrument (o). But where lands are described in general terms, the addition of a particular circumstance or description will operate by way of restriction or modification (p). Thus where an estate consisted of thirteen closes, and eight of the closes were *specifically* granted by name, it was ruled that the previous specific enumeration restrained the operation of the subsequent general words, and excluded the otherwise general effect of the deed, so that only the eight specified closes passed by the grant (g). So where one having customary tenements, *compounded* and *uncompounded*, surrendered to the use of his will "all and singular the lands, tenements, &c., whatsoever in the manor which he held of the lord by copy of court-roll, in whose tenure or occupation soever the same were, being of the yearly rent to the lord in the whole of £4, 10s. 8½d., and compounded for," it was held that the words "and compounded for" restrained the operation of the surrenderer to that description of copyholds then belonging to the surrenderer, and that the words "being of the yearly rent, &c., of £4, 10s. 8½d.," which were not referable to any actual amount of the rents, either compounded or uncompounded, though much nearer to the whole than to the compounded only, could not qualify or impugn that restriction (r).

If a grant be made of a certain farm called Lismote, now in the possession of J. S., the farm will pass to the grantee, although not in the possession of J. S., but of a different person, because the error in the name of the occupier will not vitiate the grant; but if the lands of Lismote extend into several parishes, and a grant is made of the lands of Lismote *situate in the parish of A*, then only so much of the lands as lie within the specified parish will pass, because the words "in the parish of A" are restrictive (s). Under a lease of all that part of the park called B, situate and being in the county of O, and now in the occupation of S, lying within certain specified abuttals, with all houses, &c., belonging

(n) See *Manning v. Fitzgerald*, sham, 4 M. & S. 423. But see *Ringer v. Cann*, 3 M. & W. 343.

(o) *Doe d. Smith v. Galloway*, 5 B. & Ad. 45, Com. Dig. tit. Fait, (F), 3 Preston Abstr. 206.

(p) *Doe d. Smith v. Galloway*, 5 B. & Ad. 45; *Doe d. Parkin v. Parkin*, 5 Taunt. 321; *Harris v. Greathed*, 8 East. 91; Bro. Abr. Graunts, pl. 92.

(g) *Doe d. Meyrick v. Meyrick*, 2 Cr. & J. 225; *Payler v. Homer-*

(r) *B. d. Conolly v. Vernon*, 5 East. 51. The cases are well distinguished in the judgment of the Court, delivered by Lord Ellenborough, C.J.; but see *Strut v. Finch*, 2 Sim. & St. 229.

(s) 3 Pres. Abstr. 206, *Falsa demonstratio non nocet*; *Shep. Touch.* 246.

thereto, and which now are in the occupation of S, a house on a part which was within the abutments, but not in the occupation of S, was held to pass (t). By a lease of all that townland of B, containing 509 acres arable, meadow, and pasture, bounded by certain boundaries, it was held that 400 acres of bog and land reclaimed from bog within the boundaries passed (u). Where a lease of land was described by admeasurement, "with the houses now erected or to be erected thereon" (it being found as a fact by the jury, that at the time the lease was executed the foundations of the houses had been laid), it was held to be in effect the same as the lease of a specific house, and the actual measurements not corresponding with those stated in the lease were held to be merely *falsa demonstratio* (v).

Where the demise is in its terms definite and certain, no evidence is admissible in contradiction of the instrument (w). But whether a particular thing be parcel of the demised premises, is matter of evidence to be collected from the nature of the subject, and from its state and condition at the time of making the demise (x). Thus a demise of a piece of ground, late in the occupation of J. S., will not pass a vault built under the ground demised, and which at the time of making the lease was in the tenancy of a third person (y). Nor will the demise of a messuage, with all the rooms thereto belonging, comprise a room which had been separated by a brickwork partition from the rest of the house, and which had not been used with it for many years prior to the making of the lease, although the room was situated within the external walls (z). Where there was in a lease a precise description by metes and bounds of a house and premises, but an adjoining stable occupied with the house for many years previously was not included in the metes and bounds; it was held that it did not pass under the words "together with all stables, &c., to the said premises hereby demised belonging or appertaining" (a). Where

(t) *Doe d. Smith v. Galloway*, 5 B. & Ad. 43. See *Morris v. Dimes*, 1 Ad. & E. 663; and *Martyr v. Lawrence*, 2 De G. J. & S. 261.

(u) *Jack v. M'Intyre*, 12 Cl. & Fin. 151.

(v) *Manning v. Fitzgerald*, 29 L. J. Ex. 24.

(w) *Doe d. Brown v. Brown*, 11 East. 441; *Doe d. Freeland v. Burt*, 1 T. R. 701. See *Hunt v. Singleton*, Cro. Eliz. 473.

(x) *Field v. Beaumont*, 1 B. & Ald. 247; *Skipworth v. Green*, 1 Stra. 610; *Hall v. Lund*, 32 L. J. Ex. 117.

(y) *Doe d. Freeland v. Burt*, 1 T. R. 701; *Press v. Parker*, 2 Bing. 456.

(z) *Kerslake v. White*, Appendix to Manning's 2 P. Digest, 368, 2d edit.; 2 Stark, 2 P. C. 508.

(a) *Maitland v. Mackinnon*, 32 L. J. Ex. 49.

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the premises described by metes and bounds included a portion of a walk common to a row of houses, and also granted a right of way over the whole walk to the lessee; it was held that the premises as described by metes and bounds passed to the lessee notwithstanding the grant of the right of way (b).

When the number of acres or estimated extent of the farm is specified, the words "more or less," or some equivalent expression, should be added, in order to show that the contents were mentioned as matter of general description in the lease, and not to regulate the quantity of land or amount of rent. The effect of the words "more or less," added to the statement of quantity, has not been absolutely fixed by decision, being sometimes considered as intending only to cover a small difference one way or the other, and sometimes as leaving the quantity altogether uncertain (c).

The word "appurtenances" is introduced into leases for the purpose of including any easements or servitudes used or enjoyed with the demised premises (d). In order to constitute an appurtenance, there must exist a propriety of relation between the principal or dominate subject, and the accessory or adjunct; which is to be ascertained by considering whether they so agree in nature and quality as to be capable of union without incongruity (e). If a lease be made of a house and land, with a right of cutting turf on an adjacent bog, by such demise the right of turbary will be appurtenant to the house, and upon any assignment of the lessee's interest such right will pass as an appurtenance; but a right of cutting turf cannot be rendered appurtenant to land alone, as the fuel is only intended for consumption in a

(b) *Curling v. Mills*, 6 M. & E. 173; for plan of the premises, see *Dykes v. Blake*, 4 Bing. N. C. 463.

(c) *Marquis Townshend v. Stan-groom*, 6 Vesey, 341; *Godfrey v. Little*, 2 R. & M. 630-635; *Winch v. Winchester*, 1 Vea. & B. 375; *Neale d. Leroux v. Parkin*, 1 Rep. 229; *Day v. Finn*, Owen, 133; *Cross v. Elgin*, 2 B. & Ad. 110; *Rushworth's case*, Clayton's Rep. 46. Questions on this subject often arise on contracts of sale, and serve to illustrate the construction of

similar clauses in agreements for leases. Though the land is neither bought nor sold professedly by the acre in agreements for purchase, the presumption is that, in fixing the price, regard was had on both sides to the quantity which each party supposed the estate to contain. See Sugden's "Vendors and Purchasers," 324, 14th edit.

(d) *Potter v. North*, 1 Saund. 350.

(e) See Gale on Easements, p. 11.

house (*f*). So common of pasture cannot be made appurtenant to a house without land attached to it on which cattle can be kept (*g*). Nor can land be made appurtenant to land, nor an incorporeal hereditament to things incorporeal. The strict technical meaning of the word "appurtenances" is confined to the buildings, curtilage, and garden belonging to the house, and does not include land usually occupied with the house (*h*). If, however, it can be collected from the deed itself that the parties did not intend to use the word in its strictly legal sense, the Court, in order to effectuate their object, will give to the word the meaning which the parties intended it to bear (*i*). The length of time which will invest a hereditament with the quality of an appurtenance is not capable of accurate definition, but in order to pass as appurtenant by the assignment of a lease, it should acquire the *reputation* of being parcel of the premises comprised in the demise (*j*).

Easements and privileges legally appurtenant to property pass by a conveyance of the property simply without any additional words; but easements and privileges may be used or enjoyed with, or may be reputed to appertain to, property, and may be capable of being conveyed with it, without being legally appurtenant; and such easements will not pass by a conveyance of the property simply, or without being expressly mentioned (*k*). If, however, any right of way or other easement is intended to be demised, the lease should extend to all ways or other easements appertaining to the demised premises, or *used and enjoyed* with any

(*f*) Tyrringham's case, 4 Rep. 37; Co. Litt. 121 b.

(*g*) Scholes v. Hargreaves, 5 T. R. 46.

(*h*) Bro. Abr. Feoffments de Terres, pl. 53; Bettisworth's case, 2 Rep. 32 a; Hearne v. Allen Cro. Car. 57; Buck d. Whalley v. Norton, 1 B. & P. 53; Doe d. Norton v. Webster, 12 A. & E. 442. See Smith v. Martin, 2 Saund. 401, note 2.

(*i*) See Barlow v. Rhodes, 1 Cr. & M. 439, per Lord Lyndhurst; Morris v. Edgington, 3 Taunt. 24.

(*j*) Higham v. Baker, Cro. Eliz. 16; Jennings v. Lake, Cro. Car. 168.

(*k*) See Davidson's Conveyancing,

vol. i. p. 87; James v. Plant, 4 A. & E. 749, 5 B. & Ad. 791; Barlow v. Rhodes, 1 Cr. & M. 439; Bower v. Hill, 2 Bing. N. C. 339; Thomas v. Thomas, 2 Cr. M. & E. 34; Murley v. M'Dermott, 8 A. & E. 138; Hinchcliffe v. Earl of Kinnoul, 5 Bing. N. C. 1; Only v. Gardiner, 4 M. & W. 496; Clayton v. Corby, 2 G. & D. 174; Worthington v. Gimson, 29 L. J. Q. B. 116; Suffield v. Brown, 33 L. J. Ch. 249; Crossley v. Lightowler, 36 L. J. Ch. 584; Fyer v. Carter, 1 H. & N. 916; Pol-den v. Bastard, L. R. 1, Q. B. 158. See Watts v. Kelson, L. R. 6, Ch. 166; Booth v. Alcock, L. R. 8, Ch. 633; 42 L. J. Ch. 557.

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part thereof (*l*), because the operation of the word "appurtenances" will be restrained to a previously existing right, and will not include, for instance, a right of way over the soil of the lessor which had been extinguished by unity of ownership; and such a privilege will not pass to the lessee unless it be a way of necessity, without the introduction of words showing the lessor's intention to create the right or servitude *de novo* (*m*). Where there is no right of way, properly so called, but only a road used by the owner who leases the premises, and then accepts a surrender of part with all ways, &c., therewith now used and enjoyed, this does not give the owner a right of way. Such words will *revive* a right of way which once existed, but which remained in abeyance during the joinder of the dominant and servient tenements, but they will not *create* a right of way (*n*).

Exceptions
and reserva-
tions.

After the parcels are set out, exceptions and reservations are often inserted in favour of the lessor. An exception, being the act of the lessor, is construed strictly against him (*o*). An exception must consist of some component existing part of the *thing demised*, capable of being severed and distinguished from it; while a reservation (*p*) extends to some right or profit which previously had no separate existence, but is to issue from or be derived out of the thing leased. The word "excepting" is often applied both to reservations and exceptions. But as they require remedies wholly different, they should be carefully distinguished (*q*).

(*l*) *Whalley v. Thomson*, 1 B. & P. 376; *Harding v. Wilson*, 2 B. & C. 100; *Kooysra v. Lucas*, 5 B. & Ald. 831; *Barlow v. Rhodes*, 1 Cr. M. & N. 439.

(*m*) *James v. Plant*, and other cases cited *supra*.

(*n*) *Langley v. Hammond*, L. R. 3 Ex. 161; 37 L. J. Ex. 118.

(*o*) *Shep. Touch*, 77; *Earl of Cardigan v. Armitage*, 2 B. & C. 197.

(*p*) *Shep. Touch*, p. 80. "A reservation is a clause of a deed whereby the lessor, &c., doth reserve some new thing to himself out of that which he granted before. . . . This doth differ from an exception, which is ever part of the thing granted, and of a thing *in esse* at the time" See also *Co. Litt.* 47 a; *Brook's Abr.* tit. Reservations, pl.

46; *Anon. Moor.* 90, case 234; *Anon.* 3 Leon. 29, case 57, 54; case 79, 56; case 82. "A right of way cannot in strictness be made the subject either of exception or reservation, as it is neither parcel of, nor issuing out of, the thing granted. The former being essential to an exception, and the latter to a reservation. A right of way *reserved* (using that word in a popular sense) to a lessor is, in strictness of law, an easement newly created by way of grant from the lessee, in the same manner as a right of sporting or fishing." *The Durham and Sunderland Railway Co. v. Walker*, 2 Q. B. 967, *per Tindal, C.J.* See *Pannell v. Mill*, 3 C. B. 625.

(*q*) *Com. Dig.* tit. *Faits*, (E) 8; *Pannell v. Mill*, 3 C. B. 625; *Fancy*

The requisites to make a good exception are enumerated in "Sheppard's Touchstone" (r):—1. The exception must be in apt words, as "saving," "excepting," &c. 2. It must be part of the thing demised, as timber trees (s), mines, and quarries; and not of some other thing, as rent-heriot, suit of court, suit of mill, which are reservations (t); or liberty of hawking, hunting, fishing, and shooting, which enure as rights granted by the lessee to the lessor, though words of reservation and exception be used (u). But where there was a lease of certain lands, together with all houses, water-courses, &c., excepting "a water-course flowing or descending from" a certain spot, through a meadow; it was held in this peculiar case to be an exception of the water itself, not of the channel through which it flowed (v). 3. It must be part only, and not the greater part. 4. It must be of such a thing as is severable from the thing granted, and not an inseparable incident. Thus if a lease be made of a rectory except the glebe, the exception is void, for no rectory can exist without a glebe; and so of a manor without the demesnes (w). 5. It must be of such a thing as he that doth except may have, and which properly belongs to him. Thus it must be of a particular thing out of a general, and not of a particular out of a particular, as of one acre out of twenty, or of a demise of house and shops, except the shops. It must be certainly described and set down; as if a man grant all his lands in Essex, except his lands in Dale, or excepting one particular acre, such exception is good; but if the exception be of a chamber in a house, or of an acre, without saying which chamber or acre, the exception is void (x). An *agreement to let* a farm, less a stated number of acres, will be supported in equity, though the lands *to be excepted* are not specified. Thus where a rector agreed to let a farm, except

v. Scott, 2 M. & Ry. 335; Mitcalfe v. Westaway, 17 C. B. N.S. 658, 34 L. J. C. P. 114; Proud v. Bates, 11 Jur. N.S. 441, Wood, V.C.; Doe d. Douglas v. Lock, 2 A. & E. 743; Wickham v. Hawker, 7 M. & W. 76; Lord Cardigan v. Armistage, 2 B. & C. 197; Bullen v. Denning, 5 B. & C. 842; Goodright d. Peters v. Vivian, 8 East. 190; Moore v. Earl of Plymouth, 3 B. & Ald. 68.

(r) Page 77.

(s) As to the meaning of timber trees, see "Cragg on Trees and Woods."

(t) See Doe d. Douglas v. Lock, 2 A. & E. 743.

(u) Wickham v. Hawker, 7 M. & W. 76. See Fancy v. Scott, 2 M. & R. 335; Blatchford v. Plymouth, 3 Bing. N. C. 691; Co. Litt. 47 a, 143 a.

(v) Doe d. Egremont v. Williams, 17 L. J. Q. B. 154. See Blatchford v. Mayor of Plymouth, 3 Bing. N. C. 691.

(w) Mabie's case, Winch. 23.

(x) 2 Roll Abr. 453, 454; Dorell v. Collins, Cro. Eliz. 6. See Cudlip v. Rundall, 3 Salk. 156. But see Cochrane v. M'Cleary, 4 Ir. L. R. 165; Ellis v. The Lord Primate, 16 Ir. Ch. R. 184; Moroney v. Macnamara, 6 Ir. L. R. 181.

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thirty-seven acres (not saying which), and the tenant took possession, but before the lease was executed, disputes arose respecting the lands to be taken by the rector, on a bill being filed against the tenant for non-performance of the agreement, it was held that the rector had a right to select the lands, as the lease had not been executed (*y*). A lease of lands excepted "all timber, timber trees, and other trees, &c., bushes and thorns, other than such bushes and thorns as should be necessary for the "repairs of the fences," the lessee covenanting to keep the fences in repair, and the lessor to find and provide, if growing on the premises, rough timber stakes and bushes; it was held that the provision as to bushes and thorns necessary for repairs was not an exception out of an exception, but that all trees, bushes, and thorns were excepted out of the demise, whether part of a fence or not, or whether necessary for repairs or not (*z*).

The same rule as to what is included in the particular thing leased or granted applies to exceptions (*a*). Therefore an exception of all the wood will be an exception of the soil whereon the wood grows (*b*), unless it clearly appear that it was merely the intention of the parties to except only the wood itself (*c*). Thus in *Leigh v. Heald* (*d*), by the lease of a tenement described as containing nineteen acres, save and except all timber trees, wood, and underwoods, &c., six acres of the soil, which at the time of the lease were covered with growing wood, were not excepted. The question is, whether the expression extends to the place on which the trees grow, or merely to the trees, and must be governed by the intention, to be collected from the whole of the instrument.

A valid exception or reservation out of the demised premises cannot be made to a person who is a stranger to the estate. Thus upon a conveyance of lands in fee by a mortgagee, which was confirmed by the mortgagor, to the purchaser, it was covenanted that it should be lawful for the mortgagor, his heirs and assigns, to search for coal in the premises, and to take and carry away what should be found. It was held that this covenant could not operate as an exception or reservation

(*y*) *Jenkins v. Green*, 28 L. J. Whistler v. Paslow, Cro. Jac. Ch. 817.

(*z*) *Jenney v. Brook*, 6 Q. B. 323.

(*a*) *Shep. Touch.* 100. See Hewitt v. Isham, 7 Exch. 77; Liford's case, 11 Co. B. 51 b.

(*b*) *Ive v. Sams*, Cro. Eliz. 521; *Bacon v. Gyrlling*, Cro. Jac. 296;

487.

(*c*) *Pincomb v. Thomas*, Cro. Jac.

524. See *Smith v. Bole*, Cro. Jac.

458.

(*d*) 1 B. & Adol. 622. See also

London v. Southwell, Hob. 304;

Wyndham v. Way, 4 Taunt. 316.

in favour of the mortgagor, since he had no legal estate in him, and was in law no more than a stranger to the estate, and could not except or reserve that which he had not before (e). CHAP. IV.

Reservations, or more correctly privileges (f), of shooting are, as we have seen (g), frequently created. Where nothing is said about game, the tenant has a right to kill game and other animals, and to permit others to do so (h). But he has no right even to shoot rabbits where the exclusive right of shooting and sporting is reserved (i). Reservations of shooting.

In order to cause a clause in a lease to enure as a grant from the lessee to the lessor of a liberty to shoot (j), it must be clear that such is the tenant's intention; and a reservation of all royalties, coupled with a clause providing that the landlord might use the tenant's name for the purpose of prosecuting trespassers in pursuit of game, was held not to enure as a grant of the liberty of shooting (k). The grantee of a right of shooting cannot prevent his grantor from cutting down trees, even though the result is prejudicial to the shooting (l).

The 1 & 2 Will. IV. c. 32, s. 8. provides that persons holding any land where a right of shooting is reserved shall not be entitled to shoot game (m); and under sect. 11 the landlord may authorize any other person to shoot. By sect. 30 leave and license by the occupier is no answer to a charge of trespass where the landlord has reserved the right (n).

Reservations of mines in leases do not entitle the lessor to let down the surface, or buildings thereon erected, but the lessor must leave a reasonable support for the surface (o), and it is not enough to say that he has worked the mines carefully and according to the custom (p); but it seems there may be a custom or a prescriptive right in a manor for a lord Reservations of mines.

(e) *Chetham v. Williamson*, 4 East. 469; *Moore v. Lord Plymouth*, 3 B. & Ald. 66.

(f) *Doe d. Douglas v. Lock*, 2 Ad. & El. 743.

(g) *Ante*, p. 59.

(h) *Paterson on Game Laws*, 12.

(i) *Jeffries v. Evans*, 19 C. B. N. S. 264; 34 L. J. C. P. 261.

(j) *Ante*, p. 59.

(k) *Pannell v. Mill*, 3 C. B. 625.

(l) *Gearns v. Baker*, 10 L. R. Ch. 355; 44 L. J. Ch. 334.

(m) Sect. 12 provides a penalty.

(n) See further with respect to game, Div. II. ch. 4.

(o) *Harris v. Riding*, 5 M. & W. 60.

(p) *Humphries v. Brogden*, 12 Q. B. 739; *Richards v. Harper*, 35 L. J. Ex. 130; L. R. 1 Ex. 199.

CHAP. IV. to work mines so as to destroy the surface (*q*), and an exception in a lease may be so framed as to allow the lessor to let down the surface (*r*).

Upon the other hand, where the owner grants a lease of mines, there is no implied reservation of any right to have the surface supported, and so long as the lessees only work the coal in the manner provided by the terms of the lease, they are not liable for subsidence (*s*).

5. HABENDUM.

Habendum.

The object of the *habendum* is to fix with certainty the time for which the parcels demised are to be held, and to determine the quantity of the estate granted (*t*). The *habendum*, however, is not an essential part of a deed, for the premises are the operative part. But if no *estate* be mentioned in the premises, the grantee will take nothing under that part of the deed, except by implication and presumption of law. If a *habendum* follow, the intention of the parties as to the estate to be conveyed will be expressed in the *habendum*, consequently no implication or presumption of law can be made; and if the intention so expressed be contrary to the rules of law, the intention cannot take effect, and the deed will be void. Thus where freehold lands were conveyed to W., his heirs and assigns, to hold the same unto W., his heirs and assigns, *from and after the death of H.*; it was held that an immediate estate of freehold was given by the premises, and that the *habendum* had not the effect of rendering the conveyance void by limiting a freehold to commence *in futuro* (*u*). If land be granted to J. S. generally, without words of limitation, *habendum* for years, or at will, by the premises, J. S. would take an implied estate for life, but such implication is controlled by the *express* estate mentioned in the *habendum* (*v*). Where an express estate is granted by the premises, and

- (*q*) *Wakefield v. Buccleugh*, 39 L. J. Ch. 441; L. R. 4 H. L. 377, questioning *Hilton v. Grenville*, 5 Q. B. 701. See also *Rowbotham v. Wilson*, 8 H. L. Cas. 348; 30 L. J. Q. B. 49.
- (*r*) *Williams v. Bagnall*, 15 W. R. 272.
- (*s*) *Eadon v. Jeffcock*, 42 L. J. Ex. 36.
- (*t*) *Shep. Touch.* 75; *Com. Dig.* tit. *Fait*, (E) 9.
- (*u*) *Goodtitle d. Dodwell v. Gibbs*, 5 B. & C. 709, 717; judgment of Abbot, C.J., and cases there cited, as to the operation of the *habendum*. See also *Doe d. Timmis v. Steele*, 4 Q. B. 667, Co. Litt. 299a, *Flowden*, 153; *Wyburd v. Tuck*, 1 B. & P. 464; *Shaw v. Kay*, 1 Exch. 412; 2 *Platt on Leases*, pp. 47-81; *Doe d. Darlington v. Ulph*, 13 Q. B. 244; *Bird v. Baker*, 1 E. & R. 12; *Jervis v. Tomkinson*, 1 H. & N. 195.
- (*v*) *Baldwin's case*, 2 Rep. 24 a, Co. Litt. 183 a.

an estate is created by the *habendum* contrary to the rules of law, repugnant to or inconsistent with the estate in the premises, the premises will be effectual, and the *habendum* will be rejected; and this rule was established on the principle that deeds are to be construed in the manner most favourable to the grantee; the *habendum* was therefore allowed to enlarge, though not to abridge, the estate conferred by the premises (*w*). Thus if lands be granted to J. S. and his heirs, *habendum* to him for his own life, there the grantee takes an estate in fee-simple by the premises, and the *habendum* is void (*x*). But the premises of a deed may be qualified or explained by the *habendum*, where there is no inconsistency (*y*). Thus, if land be granted to A and his heirs, *habendum* to A and the heirs of his body, the premises will be qualified by the *habendum* (*z*). The office of the *habendum* is to set forth what estate the lessee shall have, and for what time he shall hold the thing granted (*a*), and the rule is that the *habendum* controls the *reddendum*, unless it appears that the *habendum* is clearly wrong upon the face of the deed (*b*).

The time at which the term (*c*) is to commence must be stated with certainty. Thus where a lease for years was made on the 10th October, *habendum* from the 20th November, without saying in what year, or "next," or "last past," the lease was held to be void (*d*). But the commencement of the term may be fixed by reference to a contingency which must happen, although the time when it arises is uncertain (*e*). Thus a term may be created to commence on the death of lives in being (*f*), or on the determination of a subsisting

Commencement
of the term.

(*w*) Co. Litt. 299 a.

(*x*) Goodtitle *d.* Dodwell *v.* Gibbs, 5 B. & C. 739. See Lilley *v.* Whitney, 3 Dyer, 272 a; Jermon *v.* Orchard, 1 Salk. 346.

(*y*) Altham's case, 8 Rep. 154 b; Doe *d.* Timmis *v.* Steel, 4 Q. B. 227; Atkinson *v.* Baker, 4 T. R. 231. In Spyve *v.* Topham, 3 East. 114, where lands were granted by deeds of lease and release to J. T., his heirs and assigns, to hold the same unto G. B., his heirs and assigns, to the use of such persons and for such estate as J. T. should by any deed appoint, and in default thereof to J. T. and G. B., and the heirs and assigns of J. T., the estate of G. B. being in trust for J. T., his heirs and assigns, it was

held, in order to give effect to the deed, that the grant of the premises to J. T. might be rejected as surplusage, and the *habendum* prevail.

(*z*) Turnam *v.* Cooper, Cro. Jac. 476, Co. Litt. 21 a.

(*a*) Shep. Touch. p. 52.

(*b*) Burchell *v.* Clark, 46 L. J. C. P. App. 115. L. R.; 2 C. P. D. (C. A.), 88.

(*c*) Leases for lives may now commence *in futuro*. See post, p. 65.

(*d*) Anon. 1 Mod. 180; Bac. Abr. Lease, (L).

(*e*) Shep. Touch. 100, 272.

(*f*) Bac. Abr. Lease, (K); Goodright *v.* Richardson, 3 T. R. 463; Clarke *v.* Sydenham, Yelv. 85; Brownl. 136.

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term of years (*g*); and if the subsisting term be surrendered or forfeited, the second term will commence immediately (*h*). Where a lease is granted to commence before the determination of an existing lease of the same premises, it operates as an assignment of part of the reversion, and, upon the determination of the existing lease, it will become a lease for the residue of the term (*i*); if a concurrent lease be granted to the lessee of the existing lease, the latter is surrendered, and the former comes at once into operation (*j*).

A lease in reversion of several parcels of land made to commence as to each parcel on the happening of certain contingencies takes effect as regards each parcel upon the happening of such contingencies respectively (*k*). Where during a term a lessor granted a lease of part of the premises in reversion to an under-lessee in possession of that part, to commence on the day the original term ended, it was held that the reversionary lease took effect in possession at the precise moment when the original term expired (*l*). Neither is it necessary that the day of the commencement of the term should be expressly stated. Thus if a lease be made for so many years as J. S. shall name, then as soon as J. S. names the term, this ascertains as well the commencement as the duration (*m*).

In general, where the lease is by deed, and the time at which the term is to commence is not stated, the term commences from the delivery. So if no time of computation is mentioned, or the lease is to begin from the date, where there is no date, or from an impossible date (*n*), or from the end of a supposed former lease, where there is no such instrument, the commencement of the term will be reckoned from the

(*g*) Lord 'Paget's case, 1 Leon. 199; *Smith v. Day*, 2 M. & W. 684; *Blatchford v. Cole*, 5 C. B. N.S. 514; *Doe d. Agar v. Brown*, 2 K. & B. 331; *Enys v. Donniethorne*, 2 Burr. 1190; *Moore v. Musgrove*, Hob. 18.

(*h*) Co. Litt. 45 b; *Plowd.* 198; but if a lease is made to commence not at the end of a term of twenty-one years but at the end of the time twenty-one years, it will not begin until the expiration of the time. *Bac. Abr. tit. Leases*, (L) 1.

(*i*) *Harmer v. Bean*, 3 C. & K. 307; it must, however, be under seal in order to operate as an assignment of the reversion; 32 Hen. VIII.

c. 34; *Standen v. Christmas*, 10 Q. B. 135.

(*j*) *Davison d. Bromley v. Stanley*, 4 Burr. 2210; *Lyon v. Reid*, 13 M. & W. 285; *Com. Dig.* "Surrender," (L) 1, (I) 1.

(*k*) *Veal v. Roberts*, Cro. Eliz. 199.

(*l*) *Hinchliffe v. Earl of Kinnoul*, 5 Bing. N. C. 1.

(*m*) Co. Litt. 45 b; 6 Co. 35 a.

(*n*) In *Chapman v. Beecham*, 3 Q. B. 723, a deed having been made in the month of August in a leap-year, the words "29th February then next ensuing," were construed to mean the 29th February in the next leap-year.

delivery of the deed (o). The date of the deed is *prima facie* the date of its delivery, but it may be shown that a lease was delivered on a day different from the day on which it bears the date; as where a lease was dated the 25th March 1783, and there was evidence to show that the lease was not executed till sometime afterward, and the *habendum* was from the 25th March "now last past," the Court held that the term commenced from the 25th March 1783 (p). But although deeds take effect from the time at which they are delivered, and not from the day on which they are dated, yet if a reference is made *in the lease to the date of the lease, e.g.*, if the term is expressed to commence from the day of the date, its duration will be measured from that day, and not from the time at which the deed was actually delivered (q). Thus if a lease be dated the 1st of December, and be granted to commence "from henceforth," and be sealed and delivered on the 12th December, the lease in contemplation of law commences from the 1st of December (r).

If the holding is from a feast day, *e.g.*, from Michaelmas, parol evidence is not admissible to show that a holding from Old Michaelmas was intended (s). A term to commence from the date, or from the making, will be construed to include or exclude that day, according to the context and subject-matter, and in order to carry out the intention of the parties (t).

Leases for lives, as well as leases for terms of years, may now be made to commence from a day that is passed, or from a day to come, as well as from the day of the making of the lease. The word "term" may signify either the time or the *estate*, limited by the demise, and it is a question of construction in what sense the word is used; and a lease may be so worded as to run from one date in point of computation, and from another in point of interest. Thus a lease for ten years from the 1st January last will begin *in interest* from the day of making, but in computation from last January; or a lease

(o) *Higham v. Cooke*, 4 Leon. 144, Co. Litt. 46 b; *Amitt v. Breame*, 1 Salk. 76; *Taylor v. Fitzgerald*, 2 Keb. 796; *Bassett v. Lewis*, 1 Lev. 77; *Foot v. Berkley*, 1 Lev. 235; *Miller v. Mainwaring*, W. Jones, 354.

(p) *Steele v. Mart*, 4 B. & C. 272.
(q) *Shep. Touch.* 108; *Haths v. Ash*, 1 Ld. Raym. 84; *Doe d. Cox v. Day*, 10 East. 427; *Styles v.*

Wardle, 4 B. & C. 908; *Steele v. Mart*, 4 B. & C. 272; *Cooper v. Robinson*, 10 M. & W. 694; *Doe d. Darlington v. Ulph*, 13 Q. B. 204.

(r) *Llewlyn v. Williams*, Cro. Jac. 258.

(s) *Doe v. Lea*, 11 East. 312.

(t) *Pugh v. Duke of Leeds*, Cowp. 714; *Ackland v. Letley*, 9 A. & E. 879.

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for ten years from the day of the date, but which is not to commence till the expiration of a subsisting lease for five years, will begin in computation from the date, but in interest from the expiration of the subsisting lease (*u*). So where a tenant entered before the execution of the lease, and had pulled down buildings, it was held that he was not liable for those acts upon the covenant to repair contained in the subsequently executed lease, although the *habendum* referred to a period anterior to the acts complained of (*v*).

In general a letting by parol commences, where there is no evidence to the contrary, from the day of the tenant's entering (*w*). But where a tenant entered on the 21st November, which was the middle of the quarter, and at Christmas, the end of that quarter, paid his rent for that half quarter, and afterwards continued to pay rent half-yearly at Midsummer and Christmas, the tenancy was held to commence at Christmas (*x*). Where a tenant entered in the middle of a quarter, upon an agreement to pay rent "quarterly, and for the half quarter," the jury, under the judge's direction, found that the tenancy commenced from the quarter-day preceding the entry (*y*). In *Doe d. Savage v. Stapleton* (*z*), the tenant entered on the 1st August (the half quarter); at Michaelmas he paid the half quarter's rent. He afterwards paid rent on the usual feast days, and became tenant from year to year. The landlord gave a notice to quit, expiring with the half quarter. It was held not to be a necessary inference that the tenancy from year to year commenced at the half quarter, the landlord afterwards giving a notice to quit at Michaelmas. Although an agreement like a lease will, it seems, commence from the date of the instrument, in the absence of anything to the contrary, yet where an agreement dated the 20th of December mentioned no time for the commencement of the holding, and then stated that the rent was to be paid quarterly, "the first payment to be made on the 25th of March next," the tenancy was held to commence from the 25th, and not from the 20th of December (*a*). Where a tenant or his assignee holds over with the lessor's consent, the tenancy

(*u*) *Enys v. Donnithorne*, 2 Burr. 1190; *Jervis v. Tomkinson*, 1 H. & N. 195; *Lewis v. Hiliard*, 1 Sid. 374; *Wyburd v. Tuck*, 1 B. & P. 464; *Dinsdale v. Isles*, 1 Keh. 207.

(*v*) *Shaw v. Kay*, 1 Exch. 412.

(*w*) *Kemp v. Derret*, 3 Camp. 509.

(*x*) *Doe d. Holcomb v. Johnson*, 6 Esp. 10.

(*y*) *Doe d. Wadmore v. Selwyn*, Hil. T. 1807; *Adam's Ejec.* 107, 4th edition.

(*z*) 3 C. & P. 275.

(*a*) *Sandell v. Franklin*, 44 L. J. C. P. 216, L. R. 10 C. P. 377.

from year to year commences from the commencement of the lease under which he formerly held (b). CHAP. IV

The extent and duration of the term in a lease, or in any agreement for a lease (c), should be ascertained with certainty, either by the express limitation of the parties, or, as in the case of the commencement, by reference to some collateral or extrinsic circumstance which may with equal certainty fix its duration (d). As if a lease be made for so many years as A shall live, no certain number of years being named, the lease, as for a term, will be void. So if the parson of Dale make a lease for so many years as he shall be parson there, this is void, because it cannot be rendered certain. So if the lease be for years till A be promoted to a benefice (e). But although in these cases the demises, as leases for years, may be void (f), yet they may operate as leases at will, or from year to year, and may be given in evidence as proof of the rent and other terms on which the lands are held. If a man make a lease for twenty years, if A so long live, or if A be parson of Dale for so long, here, as the term is defined, the lease is good, although liable to be determined upon the death of A, in the one case, or his ceasing to be parson, in the other (g). So if A have a piece of land of the value of £20 per annum, and make a lease of it to B, until he shall levy out of the profits thereof £100, this is void as a lease for years. But if A have a rent-charge of £20 per annum, and let it to B until he shall have levied £100, this is a good lease for five years (h). And if a lease be made to A for so many years as A hath in the manor of Dale, and A have then a lease for ten years in that manor, this circumstance ascertains the term intended to be granted, and the lease will be good for ten years (i). So if a lease be made during the minority of J. S., or until J. S. shall come to the age of twenty-one, this is a good lease; for a reference to the age of J. S. will reduce the term to a certainty. But if a lease be made to A till a child in *ventre sa mere* shall come to the age of twenty-one years, this is void (j).

The duration of the term may be either for a life or lives

(b) *Doe & Castleton v. Samuel*, 5 Esp. 173; *Kelly v. Patterson*, 43 L. J. O. P. 320, L. R. 9 C. P. 681.
(c) 29 Car. II. c. 3, s. 4; *Bayley v. Fitzmaurice* (in error), 8 E. & B. 664, 27 L. J. Q. B. 143; *Clinan v. Cooke*, 1 Sch. & Lef. 22; *Clarke v. Fuller*, 16 C. B. N.S. 24.

(d) *Bac. Abr. Leases*, (L) 3.
(e) *Ibid.* *Shep. Touch.* 275.
(f) 6 Co. 36.
(g) *Shep. Touch.* 274, 275.
(h) *Ibid.*
(i) *Ibid.*
(j) *Ibid.*

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in being, or for years, or for any less period of time, either absolutely, or determinable upon some contingency, such, for instance, as the expiration of a life or lives in being (*k*). But sometimes a lease is made without any limitation in respect of time.

Where a lease is made by deed, and there are no express words limiting the duration of the term, the lessee takes an estate for his own life where the lessor is competent to grant such an interest (*l*). If the lease is by parol, and no term is specified, the lessee will be tenant at will (*m*), and he may, by payment of rent, or other circumstances, become tenant from year to year (*n*).

A lease for years, without any number being stated, is a lease for two years certain (*o*). A lease for one year certain, and so on from year to year, will create a tenancy for two years at the least (*p*). So a lease for the term of six months, and so on for six months to six months until six calendars months' notice is given, the first payment of rent to be on the 1st of July, is a tenancy for a year (*q*). Where a lease of lands was granted to another for ten years certain, and if at the end of every ten years the lessee should pay a certain quantity of tiles, he should have a perpetual demise of the land from ten years to ten years continually following, this was held a good lease for ten years only, but bad as to the rest for uncertainty (*r*). A lease for such a term as both parties please, is but a lease at will (*s*).

Tenancy at will.

A tenancy at will is a holding (*t*) by the express or implied consent of the owner, without raising any obligation on the part of either landlord or tenant to continue the tenancy for any *certain* term (*u*). A tenancy at will may be created by

(*k*) *Shep. Touch.* 274, 275. A lease for ninety-nine years, if A and B so long live, is determinable by the death of A or B. A lease for ninety-nine years, if A or B so long live, lasts till the death of the survivor. *Lord Vaux's case*, Cro. Eliz. 269. See the judgment in *Elliot v. Turner*, 2 C. B. 461; *Mortimer v. Hartley*, 6 Ex. 60.

(*l*) *Co. Litt.* 42 a; 8 & 9 Vict. c. 106, s. 3.

(*m*) See *infra*, Tenancy at Will.

(*n*) See *supra*, p. 36, and *infra*, Tenancy at Will.

(*o*) *Bac. Abr. Leases*, (L) 3.

(*p*) *Doe d. Chadborn v. Green*, 9

A. & E. 658; *Doe d. Monck v. Geeckie*, 5 Q. B. 845.

(*q*) *Reg. v. Chawton*, 1 Q. B. 247; *Simpson v. Margitson*, 11 Q. B. 23.

(*r*) *Say v. Smith*, *Plowd.* 271.

(*s*) *Bac. Abr. Leases*, (L) 3; *Richardson v. Langridge*, 7 Taunt. 128.

As to the effect of provisions with respect to notices to quit, see *infra*, Part 3, c. 4, Notice to Quit.

(*t*) *Co. Litt.* 55 a. See the judgment of Byles, J., in *White v. Bailey*, 30 L. J. C. P. 256.

(*u*) *Doe d. Bennett v. Turner*, 7 M. & W. 226; *Turner v. Doe d. Bennett*, 9 M. & W. 643; *Com.*

express agreement (v). Thus, in *Doe d. Bastow v. Cox* (w), A agreed to become tenant to C and D of certain premises *at their will and pleasure*, at certain rent payable quarterly. A remained in possession under this agreement two years and a half, and paid a year's rent; it was held that A was tenant at will. A tenancy at will is implied where a constructive tenancy from year to year would be inconsistent with the nature of the transaction, or would defeat the object of the parties. A demise for years, with a proviso that the lessor may enter at his will, is only a lease at will (x).

A person put into possession of lands in which he has no freehold estate or tenancy for any certain term, under an executory agreement, or accepted proposal for a future lease at a yearly rent, is only tenant at will prior to the payment of rent (y), or prior to any other act done from which a tenancy from year to year can be inferred (z); because the agreement for a future lease, although creating the relation of landlord and tenant, even before payment of rent (a), does not confer any legal estate, and the tenancy at will created by putting the party in possession has no relation to the reserved rent; but after payment of any portion of the stipulated rent or other recognition of holding under such contract, a constructive tenancy from year to year is implied subject to the terms of the agreement. If a person enter into possession of lands with the owner's consent or privity, pending a treaty for purchase or for a lease, a tenancy at will arises (b). If a person enter into or continue in possession of land, with the consent or privity of the owner, or if

Dig. tit. Estate, (H) 1; Richardson v. Langridge, 4 Taunt. 128.

(v) *Ball v. Cullimore, 5 Tyrwh. 753; Richardson v. Langridge, 4 Taunt. 128; Cudlip v. Rundle, 4 Mod. 9; R. v. Fillongley, Cald. 569. See Marquis of Camden v. Batterbury, 5 C. B. N.S. 508.*

(w) *11 Q. B. 122.*

(x) *Skarburg v. Pevenet, 21 Hen. VI. fol. 37 b, Year Book; Turner v. Hodges, Litt. 235, by Yelverton.*

(y) *Hamerton v. Stead, 3 B. & C. 483, per Littledale, J.; Rex v. Collett, R. & R. 498; Doe d. Groves v. Groves, 10 Q. B. 486; Doe d. Jones v. Jones, 10 B. & C. 718; Doe d. Nicholls v. M'Kaeg, 10 B. & C. 721; Doe d. Price v. Price, 9 Bing. 356.*

(z) *Cox v. Bent, 5 Bing. 185;*

Vincent v. Gordon, 24 L. J. Ch. 121, per Cranworth, L.C.; Doe d. Hull v. Wood, 14 M. & W. 682. See the notes to Clayton v. Blakey, 2 Smith's L. C. 97.

(a) *Hamerton v. Stead, infra.*

(b) *Right d. Lewis v. Beard, 13 East. 210; Doe d. Newby v. Jackson, 1 B. & C. 448; Ball v. Cullimore, 2 Cr. M. & R. 120; Doe d. Gray v. Stanion, 1 M. & W. 695; Kirtland v. Pounsett, 2 Taunt. 145; Hope v. Booth, 1 B. & Ad. 498; Doe d. Milburn v. Edgar, 2 Bing. N. C. 498; Winterbottom v. Ingham, 7 Q. B. 611; Doe d. Stanway v. Rock, 4 M. & Gr. 30; Doe d. Tomes v. Chamberlaine, 5 M. & W. 14; Doe d. Bord v. Burton, 16 Q. B. 807; Doe d. Hiatt v. Miller, 5 C. & P. 595; In re Banks v. Reb-*

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the owner recognise a person as having lawful occupation, or if the occupier be exempted from the consequences of a trespass by an implied license, he is tenant at will to the owner (c). A mortgagor in possession has often been called tenant at will to the mortgagee, but this relationship is perfectly anomalous and *sui generis*; there is no actual tenancy, for the mortgagor has not even the rights of a tenant at will, since he may be turned out of possession without notice to quit or demand of possession, and is not entitled to emblements (d). But a tenancy at will may, by express agreement, be created between a mortgagee and mortgagor (e). The notion of a mortgagor being in some cases tenant at will seems to be recognised by 3 & 4 Will. IV. c. 27, s. 7, which provides that no mortgagor shall be deemed to be a tenant at will to the mortgagee within the meaning of that clause. On the whole, it seems more correct to say that a mortgagor in possession is a tenant on sufferance only (f), or at most a *quasi* tenant at will, and he may be treated either as a tenant or trespasser at the election of the mortgagee. Therefore, where the mortgagor remains in possession, and the money is not repaid on the day stipulated, the mortgagee may eject the mortgagor without notice to quit or demand of possession; thereupon the mortgagee will be entitled to recover, together with the land, all the growing crops, fixtures, &c., in respect whereof the mortgagor will not be entitled to any compensation (g).

beck, 2 Low. M. & P. 452; Saunders v. Musgrave, 6 B. & C. 524; Anderson v. Midland Railway Co. 30 L. J. Q. B. 94. But see Doe d. Rogers v. Pullen, 2 Bing. N. C. 749; Doe d. Parker v. Boulton, 6 M. & S. 148; Tew v. Jones, 13 M. & W. 12.

(c) Doe d. Price v. Price, 9 Bing. 356; Doe d. Whitaker v. Hales, 7 Bing. 322, 323, 326; Doe d. Foley v. Wilson, 11 East. 57. See post p. 89.

(d) Christopher v. Sparkes, 2 Jac. & W. 234, by Sir Thomas Plumer; Wilson *ex parte*, 2 Ves. & B. 252; Lord Cholmondeley v. Lord Clinton, 2 Jac. & W. 182; Hitchman v. Walton, 4 M. & W. 413; Doe d. Higginbotham v. Barton, 11 A. & E. 307; Doe d. Roby v. Maisey, 8 B. & C. 767; Doe d. Fisher v. Giles, 5 Bing. 421. See also the judgment of Buller, J., in Birch v. Wright, 1 T. R. 382, 383; Moss v. Gallimore, 1 Smith's L. C. 542,

judgment of Ashurst, J.; see Coote on Mortgages, 319-324.

(e) Doe d. Basto v. Cox, 11 Q. B. 112; Doe d. Dixie v. Davies, 7 Ex. 89; Pinhorn v. Souster, 8 Ex. 763. See also Metropolitan Assurance Co. v. Brown, 4 H. & N. 428; Doe d. Rogers v. Cadwallar, 2 B. & Ad. 473; Doe d. Whitaker v. Hales, 7 Bing. 322; Doe d. Wilkinson v. Goodier, 10 Q. B. 957; Doe d. Snell v. Tom, 4 Q. B. 615; West v. Fritchie, 3 Ex. 216; Morton v. Woods, 37 L. J. Q. B. 242; L. R. 4 Q. B. 293.

(f) As to Tenancy on Sufferance, see post, p. 89.

(g) Woodfall, "Landlord and Tenant," p. 189, 10th ed.; Thunder d. Weaver v. Belcher, 3 East. 499; Doe d. Roby v. Maisey, 8 B. & C. 767; Doe d. Fisher v. Giles, 5 Bing. 421; Walmesley v. Milne, 7 C. B. N.S. 115, 133; Keach v. Hall, 1 Dougl. 21; Metropolitan Assurance Co. v. Brown, 4 H. & N. 428.

The peculiarity of this holding (tenancy at will) is that any act committed by either landlord or tenant inconsistent with its nature determines it, since the tenancy exists only during the joint will of both parties (*h*). Thus in *Doe d. Bennett v. Turner* (*i*), the landlord had entered on the premises and cut some stone without the permission of his tenant at will. This act was held to operate as a determination of the tenancy. So, too, the death of either party determines the tenancy (*j*); but on the death of one of several lessors, the demise being joint, the interest survives (*k*). Thus acts of ownership inconsistent with the tenancy, exercised by either landlord or tenant on the land (*l*), or off the land, if the other party have notice thereof—as, for instance, alienation of the reversion with notice to the tenant, or assignment or underlease with notice to the landlord (*m*)—will determine the tenancy. The tenancy at will may also be determined by a demand of possession or express declaration of either of the parties (*n*).

Strict tenancies at will having been found inconvenient, leases for one year, and so from year to year, as long as both parties pleased, were introduced in the reign of Henry VIII., and such a lease was binding for two years certain; but prior to the reign of George III. such tenancies could only have been constituted by express contract. Lord Mansfield, however, soon after he became Chief-Justice, established the present system of tenancies from year to year, determinable at the end of any year on giving six months' previous notice,

Tenancy from
year to year.

(*h*) *Co. Litt.* 55 a, 68; *Com. Dig. tit. Estate, (H, G)*.

(*i*) 7 *M. & W.* 226, 643. See also *Doe d. Price v. Price*, 9 *Bing.* 356.

(*j*) *Crockerell v. Owerell*, *Holt*, 417; *Doe d. Lewis v. Lord Cawdor*, 1 *Cr. M. & R.* 398; *Co. Litt.* 62 b.

(*k*) *Henstead's case*, 5 *Rep.* 10.

(*l*) See the judgment of Lord Denman in *Doe d. Bennett v. Turner*, 9 *M. & W.* 646; *Doe d. Moore v. Lawdor*, 1 *Starkie R.* 308; *Pinhorn v. Souster*, 8 *Ex.* 763; *Carpenter v. Collins*, *Yelv.* 73.

(*m*) *Diadale v. Isles*, 2 *Lev.* 88; *Ball v. Cullimore*, 2 *Cr. M. & R.* 120; *Doe d. Goody v. Carter*, 9 *Q. B.* 863. In *Doe d. Davies v. Thomas*, 6 *Ex.* 854, it was held that where a lessor became an insolvent debtor after the creation of the tenancy at will, the vesting order, with knowledge thereof to the tenant, deter-

mined the tenancy. *Doe d. Jones v. Jones*, 10 *B. & C.* 718; *Goodtitle v. Herbert*, 4 *T. R.* 680; *Wallis v. Delmar*, 29 *L. J. Ex.* 276; *Daniels v. Davison*, 16 *Ves.* 249; *Pollen v. Brewer*, 7 *C. B. N.S.* 371; notes to *Clayton v. Blakey*, 2 *Smith's L. O.* 97, 5th edition; *Melling v. Leake*, 16 *C. B.* 652. See the judgment of *Byles, J.*, in *White v. Bailey*, 10 *C. B. N.S.* 227; *Co. Litt.* 55 b, note 15.

(*n*) *Doe d. Price v. Price*, 9 *Bing.* 356; *Locke v. Matthews*, 13 *C. B. N.S.* 753; or by notice to quit in a week, *Doe d. Bastow v. Cox*, 11 *Q. B.* 122. Where a purchaser enters under a contract of sale and the contract is rescinded, the tenancy is put an end to by the rescission without any demand of possession. *Markey v. Coote*, 10 *Ir. R. C. L.*, 149 *Exch.*

CHAP. IV. and extended the principles applicable to such holdings to every tenancy which could afford reasonable ground for the inference (o).

A tenancy from year to year is a lease for a year certain, with a growing interest during every year thereafter, springing out of the original contract and parcel of it (p). There may be a letting for a year, determinable as may be agreed upon between the parties (q), and the periods at which rent is reserved have no *necessary* relation to the duration of the holding, or to the length of notice required (r).

A general letting at a yearly rent, though payable quarterly, or an acceptance of a yearly rent, or rent measured by any aliquot part of a year, is evidence of a taking from year to year (s). Thus where premises were let at a yearly rent, payable weekly, with power to determine the tenancy at three months' notice from any quarter-day, it was held that a yearly tenancy was created, determinable as agreed (t). But where houses or lodgings are let for an uncertain period, at a quarterly, monthly, or weekly rent, a quarterly, monthly, or weekly tenancy is usually presumed (u).

Quarterly,
monthly, and
weekly tenancy.

Option to
determine.

Sometimes the lease is for a certain number of years, determinable sooner at the election of the parties or one of them. Where the option is given expressly to each party, no difficulty can arise, and the term may be determined by either (v). A lease for twenty-one years, expressed "to be determinable,

(o) *Agard v. King*, Cro. Eliz. 775; *Dean d. Joeklin v. Cartwright*, 4 East. 31; *Timmins v. Rowlinson*, 3 Burr. 1603; *Gulliver d. Tasker v. Burr*, 1 W. Bla. 1171; *Right d. Flower v. Darby*, 1 T. R. 159; *Doe d. Shore v. Porter*, 3 T. R. 13. As to tenancies at will created by instruments which do not comply with the Statute of Frauds, enuring as tenancies from year to year, see *ante*, p. 36; and as to tenants holding over, see *post*, Part III., c. 1.

(p) *Oxley v. James*, 13 M. & W. 214.

(q) *Doe d. Parry v. Hazell*, 1 Esp. 94; *Kemp v. Derrett*, 3 Camp. 510; *Towne v. Campbell*, 3 C. B. 921; *Jones v. Mills*, 10 C. B. N.S. 788; *Doe d. King v. Grafton*, 18 Q. B. 496; but see *Doe d. Chadborn v. Green*, 9 A. & E. 658.

(r) *Doe d. Peacock v. Raffan*, 6 Esp. 4.

(s) *Richardson v. Langridge*, 4 Taunt. 128; *Doe d. Hall v. Wood*, 14 M. & W. 682; *Rex v. Herstmonceaux*, 7 B. & C. 551.

(t) *Rex v. Herstmonceaux*, 7 B. & C. 551. See *Doe d. Pitcher v. Donovan*, 1 Taunt. 555; *Brown v. Burtindshaw*, 7 D. & R. 603; *Flurence v. Robinson*, 24 L. T. N.S. 705; *Holms v. Day*, 8 Ir. R. C. L. 235.

(u) *Wilkinson v. Hall*, 3 Bing. N. C. 508; *Kemp v. Derrett*, 3 Camp. 510; *Huffel v. Armistead*, 7 C. & P. 56; *Doe d. Landsell v. Gower*, 17 Q. B. 589; *Towne v. Campbell*, 3 C. B. 921; *Doe d. King v. Grafton*, 18 Q. B. 496; *Wilson v. Abbott*, 3 B. & C. 88; *Monks v. Dykes*, 4 M. & W. 567.

(v) *Goodright v. Mark*, 4 M. & S. 30; *Bird v. Baker*, 1 E. & E. 12; *Roe d. Bainford v. Hayley*, 12 East. 464.

nevertheless, in seven or fourteen years, if the parties shall think fit," is determinable only by consent of *both* the parties (*w*). Where the instrument is silent as to the party who is to exercise the right to determine, the lessee only has the option of determining the lease at the specified time, on the principle that where the words of a grant are doubtful, they must be construed most strongly in favour of the grantee (*x*).

6. REDDENDUM.

The reddendum is that part of the lease by which the rent is reserved. No particular form of words is necessary, but the words "reserving," "rendering," "yielding," "paying," &c., are the words usually employed. The office of the reddendum is to define what rent shall be paid, to whom it shall be paid, at what time it shall be paid, how it shall be paid, and where it shall be paid.

The distinctions which existed at common law between rent-services, rent-seck, and rent-charges, are now usually of little practical importance (*y*). Rent may be defined to be a certain return made by the tenant, either in labour, money, or provisions, for the estate demised to him; and, as a general rule, the rent must issue out of lands and corporeal tenements, as part of their actual or possible profits, and be payable at fixed intervals during the tenancy (*z*). It is not necessary that the return should be in money, for the reservation may be the delivery of horses, capons, roses, spurs, wheat, or the like (*a*); or it may consist of the personal services of the lessee, in labouring or journeying for the lessor at certain stipulated times (*b*); as, for instance, to plough so many acres of land, to clean the parish church, or to ring the church bell at stated times (*c*).

(*w*) *Fowell v. Tranter*, 34 L. J. Ex. 6. of lands as incidental to their tenure. Rent-charge is a rent granted out of lands by the owner

(*z*) *Dann v. Spurrier*, 3 B. & P. 399; *Price v. Dyer*, 17 Ves. 356; *Doe v. Dixon*, 9 East. 15. See *Goodright v. Richardson*, 3 T. R. 462; *Powell v. Smith*, 41 L. J. Ch. 734; L. R. 14 Eq. 85. to some other person with a clause of distress. Rent-seck is a rent-charge without clause of distress. *Bac. Abr. Rent*, (A).

(*a*) See *infra*, Part 2, c. 2, s. 2, Distress; *Bac. Abr. tit. Rent*, (A), 1-3; *Co. Litt.* 87 b, 143 b; *Bradbury v. Wright*, 2 Dougl. 624; *Judgment of Buller, J., The Governors of Christ's Hospital v. Harrild*, 2 M. & Gr. 713. Rent-service is a rent reserved upon a grant or lease of lands as incidental to their tenure. Rent-charge is a rent granted out of lands by the owner to some other person with a clause of distress. Rent-seck is a rent-charge without clause of distress. *Bac. Abr. Rent*, (A).

(*b*) *Burton's Real Property*, pp. 330, 331; *Gilbert on Rents*, p. 9; *Co. Litt.* 47 a, 141 b, 142 a. (*a*) *Co. Litt.* 142 a. (*b*) *Lanyon v. Carne*, 2 Saund. 165. (*c*) *Doe d. Edney v. Benham*, 7 Q. B. 907; *Doe d. Edney v. Billet*, 7 Q. B. 967. See also *Doe d. Robin-*

From what rent may issue.

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Nature of
rent.

The rent reserved, however, must be certain, the quantum or amount being either expressly stated with certainty, or becoming so by reference to something else that can be certainly ascertained (*d*). Where, therefore, a man demised at will, *reddendum after the rate of 18 per annum, as long as the demise shall continue*, the reservation was held bad for uncertainty, for it might be in corn, or any other thing of value, and as no time was limited for the payment of it, an action might be brought every day for it (*e*). Where a marl-pit and brick-mine were demised (*f*), the tenant agreeing to pay so much a quarter for every yard of marl that he might get out, and 1s. 8d. per thousand for all the bricks that he might make; it was held that this reservation was sufficiently certain. If the reservation be of so many quarters of corn (*g*), it will be understood to mean legal quarters, reckoning the bushel at eight gallons, although leases of the same lands prior to the 22 & 23 Car. II. c. 12, contained the same reservation, and the lessees had been accustomed to pay by composition, reckoning the bushel as nine gallons (*h*). A reservation of eight bushels of grain in lieu of one quarter is good, because it is all one in quality, value, and nature (*i*). In a lease of land for twenty-one years from the 25th March 1848, it was covenanted that the lessee should pay a stipulated sum for the first year, with a proviso that the rent for each subsequent year of the term should be reduced or increased according to the "average price of wheat in any one year of the said term," such average "to be taken and ascer-

son v. Hinde, 2 M. & Rob. 441; Duke of Marlborough v. Osborn, 5 B. & S. 67.

(*d*) Co. Litt. 96 a. See Dean d. Jacklin v. Cartwright, 4 East. 31.

(*e*) Parker v. Harris, 1 Salk. 262.

(*f*) Daniel v. Garvie, 6 Q. B. 145. See judgment of Lord Denman in R. v. Westbrook, 10 Q. B. 205; Co. Litt. 96 a.

(*g*) A restriction occurs with regard to college leases created by statute, 18 Eliz. c. 6, by which it is directed that one-third of the old rent then paid should for the future be reserved in wheat or malt, reserving a quarter of wheat for each 6s. 8d., or a quarter of malt for every 5s.; or that the lessees should pay the same according to the price that wheat or malt should be sold for in the market next adjoining to the respective colleges on the market-day before the rent became due.

This sagacious plan is said to have been the invention of Lord Treasurer Burleigh and Sir Thomas Smith, then principal Secretary of State, who, observing how greatly the value of money had sunk, and the price of all provisions risen, by the quantity of bullion imported from the newly-found America, devised this method for upholding the revenue of colleges. Their foresight and penetration have in this respect been very apparent. The corn rent has made the old rent approach in some degree nearer to its present value; otherwise it would seem that the principal advantage of a corn rent is to secure the lessor from the effect of a sudden scarcity of corn. 2 Blac. Com. 322.

(*h*) The Master, &c., of St. Cross v. Lord Howard de Walden, 6 T. R. 338.

(*i*) Mountjoy's case, 5 Co. E. 3 b.

tained from the then current year's averages, which were taken in the month of January in every year, under and by virtue of the Tithe Commutation Act, 6 & 7 Will. IV. c. 71, s. 56," which was the result of the sales "during the seven years ending on the Thursday next before Christmas-day then next preceding;" it was held that the rent might be computed according to such septennial average so published in each year (*j*).

The rent must consist in something issuing out of the thing demised, though differing from it in nature; for if it be part of the thing itself, that would not be a reservation, but an exception (*k*). Thus, it is said—"If one grant land yielding for rent, money, corn, horse, spurs, or a rose, or any such like thing, this is a good reservation; but if the reservation be of the grass, or of the vesture of the land, or of a common, or other profit to be taken out of the land, these reservations are void (*l*). A royalty payable by the tenant upon the bricks which are made out of the land demised is a rent (*m*). In the case of a demise of mines, the rent reserved may, it seems, consist of a portion of the ore, which is the substance of the land itself (*n*). The rent, as a general rule, must issue out of lands and such things as are capable of livery, and may be distrained upon (*o*). Thus a rent cannot issue out of a demise of an incorporeal hereditament, or of goods; but a reservation in such a case may be binding on the parties as a contract. A rent reserved upon a lease of a future interest in land is good, for although the lessor cannot distrain during the continuance of the particular estate, yet there is a possibility of his doing so on its determination. A lease of the vesture or herbage of land reserving rent is good, as the lessor may come on the land and distrain the lessee's beast (*p*). The Crown, too, may reserve rent on a demise of an incorporeal hereditament, because by its prerogative a distress may be levied on all the lands of the lessee (*q*). It is a general rule that where rent is nominally reserved out of two things, one of which is capable of supporting a rent and the other

(*j*) *Kendal v. Baker*, 11 C. B. 482.

(*k*) See *ante*, Exceptions from Demise, p. 58; 1 Inst. 47 a.

(*l*) *Shep. Touch.* p. 80. See also *Doe d. Douglas v. Lock*, 2 A. & E. 744; *Brooke's Abr. tit. Reservations*, pl. 46; *Co. Litt.* 47 a.

(*m*) *Reg. v. Westbrook*, 10 Q. B. 178.

(*n*) *Campbell v. Leach*, *Anst.* 740;

Buckley v. Kenyon, 10 East. 139; *R. v. Earl of Pomfret*, 5 M. & S. 139; but see *R. v. The Inhabitants of St. Anstell*, 5 B. & A. 693.

(*o*) *Co. Litt.* 47 a, 142 a; *Bac. Abr. tit. Rent*, (B); *Williams v. Hayward*, 28 L. J. Q. B. 374.

(*p*) *Co. Litt.* 47, 142 a.

(*q*) *Bac. Abr. tit. Rent*, (B).

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not, it will be taken to issue wholly out of the former (r). Thus in *Spencer's case* (s), where a house and land, with a stock or sum of money, was demised, rendering rent, it was held that the rent issued out of the land only. But although the rent issues in these cases only out of the corporeal hereditament in point of remedy, it is considered to issue out of both in point of render (t). Thus in *Gardiner v. Williamson* (u), A, by instrument not under seal, agreed to let to B the rectory of L, and the tithes arising from the lands in the parish of L, and also a messuage used as a homestead for collecting the tithes, at the yearly rent of £200; it was held that as the agreement, not being under seal, did not operate as a demise of the tithes, the rent could not be distrained for, as there was no distinct rent reserved for the homestead.

Sum in gross not
rent.

Where a lessee simply covenants or promises to pay a certain sum yearly, without stating it as a consideration for the demise of the premises, it will not be a rent, but a sum in gross, to the payment of which he will be liable by reason only of his contract (v). Thus in *Hoby v. Roebuck* (w), where a lessee agreed to pay his lessor annually, during the residue of the lessee's term, ten per cent. on the cost of new buildings if the lessor would erect them; it was held that this sum could not be distrained for as rent. So in *Donnellan v. Read* (x), where a lessor demised premises for a term of years at £50 a year, and agreed with his tenant to lay out £50 in making certain improvements upon them, the tenant undertaking to pay him an increased rent of £5 a year during the term; it was held that this sum of £5 was not a rent in a legal sense of the word. We have seen (y) that generally where a termor lets for the whole of his term, such letting operates as an assignment; but in such case he can recover the reserved rent as rent, and need not sue for it as a sum in gross (z), and the assignee of such rent can recover it (a).

Rent follows
Reversion.

Rent, being incident to the reversion, will follow that

(r) *Newman v. Anderton*, 2 N. R. 224; *Salmon v. Matthews*, 8 M. & W. 827; *Farewell v. Dickenson*, 6 B. & C. 251.

(s) 5 Rep. 16.

(t) *Dean of Windsor v. Gover*, 2 Wm. Saunds, 303; *Gardiner v. Williamson*, 2 B. & Ad. 336; *Bird v. Higginson*, 2 A. & E. 696, 6 A. & E. 824; *Meggison v. Bowers*, 21 L. J. Ex. 284.

(u) 2 B. & Ad. 336.

(v) *Smith v. Mapelbach*, 1 T.R. 441.

(w) 7 Taunt. 157.

(x) 3 B. & Ad. 899. See also *Lambert v. Norris*, 2 M. & W. 333; *Marquis of Camden v. Batterbury*, 7 O. B. N.S. 804.

(y) *Ante*, p. 11.

(z) *Newcombe v. Harvey*, Carth. 161; *Baker v. Gostling*, 1 Bing. N. O. 19; *Williams v. Hayward*, 1 E. & E. 1040; 28 L. J. Q. B. 374.

(a) *Williams v. Hayward*, *supra*.

reversion. Rent therefore should be reserved to the lessor, and not to a third party (*b*). Thus where a man seised in fee leases for life or years reserving rent, the whole rent which becomes due after his death goes with the reversion (as an incident thereof) to the heir, and not to the executor; for since, during the continuance of the particular estate, the reversioner loses the profits of the land, the rent ought to be paid to him as a compensation for the loss (*c*). Where there is any doubt as to the person to whom the reservation should be made, the clearest and safest way is to reserve the rent generally during the term, without saying to whom, and leave it to be distributed by the law in the mode pointed out in Whitlock's case (*d*); for if the reservation of rent be general during the term, the law directs it to be paid according to the intent and nature of the thing demised (*e*). Thus if a person seised in fee settles his estate on himself for life, with remainders to other persons, reserving a leasing power, which he afterwards exercises, reserving rent to himself, his heirs, and assigns, those in remainder shall have the rent. So also where a person seised in fee settles his estate on A for life with remainders, and gives him a leasing power, which he exercises, reserving rent during the term, the remainder-men shall take, although neither heirs nor assigns of A (*f*).

7. COVENANTS.

A covenant is an engagement entered into under seal (*g*), whereby one person binds himself to do something beneficial to another, or to abstain from an act which, if done, would be prejudicial to another (*h*). The general principle is clear, that the landlord, having the *jus disponendi*, may annex whatever conditions he pleases to his lease, provided they are not illegal or impossible. A covenant therefore to do a thing which, upon the face of it, appears to be prejudicial to the public interest, or otherwise contrary to law, is *ipso facto*

(b) Co. Litt. 47 B. 143 b; Com. Dig. tit. Rent, (B) 5.

(c) Co. Litt. 47 a; Cother v. Merriek, Hard. 95; Bao. Abr. Executors, (H) 3; Oates v. Frith, Hob. 130; Sacheverell v. Froggat, 2 Saund.; Southampton v. Brown, 6 B. & C. 718. But a reservation of rent to a third party is binding as a contract. Jewel's Case, 5 Rep. 3.

(d) 8 Co. Rep. 70, 141.

(e) Whittome v. Lamb, 12 M.

& W. 813; Dollen v. Batt, 27 L. J. C. P. 281.

(f) Greenway v. Hart, 23 L. J. C. P. 115; Isherwood v. Oldknow, 3 M. & S. 382.

(g) The word "covenant," used in an agreement not under seal may, in order to effectuate the intention of the parties, be construed to mean "contract" or "stipulation." Hayne v. Cummings, 16 C. B. N.S. 421.

(h) Bao. Abr. tit. Covenants.

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void (i). Thus if a lease is made for the express purpose of the premises being used to boil oil and tar, contrary to the provisions of an Act of Parliament, the covenant for payment of rent is void (j). If a man covenant to do a thing which to-day is lawful, but to-morrow is by statute made unlawful, the covenant will be thereby extinguished; or if he covenant not to do a thing, and then a statute is made which compels him to do it, the covenant becomes void (k); but if he covenant to do that which is afterwards made unlawful in part only, it must be performed so far as it continues lawful. If a man covenant not to do a thing which is unlawful, and then a statute makes it lawful, the covenant is not thereby repealed; but if he covenant to do a thing unlawful by statute, the performance of the covenant is not rendered lawful by a repeal of the statute, for the covenant was void *in initio* (l). But there is nothing to prevent persons, if they so please, from binding themselves by a contract as to any future state of the law, although in general they are to be considered as contracting with reference to the law as it then exists (m). A covenant to do a thing which is impossible, if the impossibility exists at the time the covenant is made, is void; but if it be then possible, and afterwards become impossible, the covenantor will still be liable in the express words of his covenant (n). Where a covenant seems to relate to something which is impossible, the Court will incline to the view that a man did not really warrant to be possible that which was impossible, if a reasonable construction suggests itself (o). Where a covenant is dependent upon a conveyance of an estate which proves to be void, and no estate passes, the covenant is void (p). Thus a covenant in a lease to repair *during the term* is void, where the lessor does not execute the lease (q). But independent covenants in a lease

(i) *Shep. Touch.* 163; *Lowe v. Peers*, 4 Burr. 2225. By 5 & 6 Vict. c. 35, s. 103 (Property-Tax Act), a covenant for the payment of rent in full without allowing a deduction for the property-tax is void. See *infra*, Part 2, Div. 1, c. 1, s. 3, Deductions; and see *post*, *Certain Trades, &c.*, p. 91.

(j) *The Gas Light Co. v. Turner*, 5 Bing. N. C. 666.

(k) See the judgment in *Baily v. Crespigny*, L. R. 4 Q. B. 185.

(l) *Brewster v. Kitchell*, 1 Salk. 198; *Brason v. Dean*, 3 Mod. 39; *Jaques v. Withy*, 1 H. Bl. 65.

(m) See judgment of Maule, J., in

Mayor of Berwick v. Oswald, 3 E. & B. 665, 23 L. J. Q. B. 324.

(n) *Shep. Touch.* 663; *Blight v. Page*, 3 B. & P. 295, n. (a); *Barker v. Hodgson*, 3 M. & S. 267; 1 Rol. Abr. 420, O. 4, 8; *Bute, Marquis of, v. Thompson*, 13 M. & W. 487; *Appleby v. Myers*, L. R. 2 O. P. 651; *Clifford v. Watts*, L. R. 5 O. P. 577; 40 L. J. O. P. 36.

(o) *Per Willea, J.*, *Clifford v. Watts, supra*.

(p) *Capenhurst v. Capenhurst*, Sir T. Raym. 27; *Hayne v. Maltby*, 3 T. R. 438.

(q) *Pitman v. Woodbury*, 3 Exch. 4; *Linwood v. Squire*, 5 Exch.

may be enforced, although no estate passes (*r*). Covenants are such as either run with the land, or are merely personal. A covenant running with the land is one which affects the nature, quality, or value of the land demised, or the mode of enjoying it independently of collateral circumstances (*s*).

(a.) EXPRESS COVENANTS.

Express covenants are such as are created by the express words of the parties in a deed declaratory of their intentions; and in order to constitute such a covenant, the law does not require any precise or technical language. Thus words in the form of an exception or restriction may amount to a covenant (*t*). The lease in general contains express covenants by the lessee for the payment of the rent (*u*), for the payment of taxes, &c. (except the sewers' rate, land and property taxes), for the repair of the premises during the term, for leaving them at the end of the term in a proper state of repair, and for the insurance and rebuilding of the premises in case of their destruction by fire. The lessee also usually covenants not to assign or underlet without the consent of the lessor, and sometimes not to carry on offensive trades. There is a covenant by the lessor, on the other hand, for quiet enjoyment; and he not unfrequently covenants to pay some of the rates or assessments, or a portion of them.

An express covenant for the payment of rent is inserted in every indenture of lease, and usually binds the lessee, his heirs, executors, administrators, and assigns to its performance. The lessee, and after his death his personal representatives, having assets, are answerable for the rent during the continuance of the lease. If the covenant expressly include the heirs of the lessee, his real representatives having inherited assets from the ancestor will be chargeable for breach of the covenant, either in the lifetime of the lessee, or after his death. If the lease be assigned, the original lessee continues liable for the rent during the lease, in respect of privity of contract, and

234; *Wheatley v. Boyd*, 7 Exch. 20; *Swatman v. Ambler*, 8 Exch. 72. Compare these cases with *Hughes v. Clarke*, 10 C. B. 905; *Morgan v. Pike*, 14 C. B. 473; *Wood v. Copper Miners Co.* 14 C. B. 594; *Northampton Gas Co. v. Parnell*, 15 C. B. 630; *Bowes v. Croll*, 6 E. & B. 255; *Hew v. Greek*, 3 H. & C. 391. (*r*) *Northcote v. Underhill*, 1 Salk. 199.

(*s*) *Spencer's case*, 5 Rep. 16, 1st and 2d Resolutions. See *infra*, Part 4, c. 1, s. 4.

(*t*) *The Duke of St. Albans v. Ellis*, 16 East. 352.

(*u*) A covenant may be inserted to pay interest on arrears of rent. *Tynte v. Hodge*, 2 H. & M. 287. See note by Mr. Cole in *Woodfall's "Landlord and Tenant,"* 1013, 9th edit.

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his heirs, if named, and his personal representatives, though not named, remain liable, so far as assets have come to their hands. The assignee is also liable for the rent in respect of the privity of estate (*v*) during his ownership.

Payment of taxes.

The liability to pay taxes is usually provided for in the lease. The usual covenant by the tenant is "to pay all rates, taxes, duties, and assessments whatsoever, whether parochial, parliamentary, or otherwise, now charged, or hereafter to be charged, upon the demised premises, or any part thereof, or upon the rent, or any part thereof, except sewer's rates, land-tax, and property-tax." Sometimes there is an express covenant by the landlord to pay the land-tax (*w*).

If the lessee covenants to pay "all rates, taxes, and assessments," these include the land-tax; for when taxes are generally mentioned, they must be understood to signify parliamentary taxes, if the subject-matter will suffer it, and the lessee would consequently be charged with the payment of all land-taxes, even those imposed by Act of Parliament long after the commencement of the lease, notwithstanding the word "parliament" was not expressed in the covenant (*x*). In *Bradbury v. Wright* (*y*), the tenant covenanted to pay the rent "without any deduction, defalcation, or abatement, for or in any respect whatsoever." Upon this covenant he was held liable to pay the land-tax. A sewer's rate not being directly imposed, *i.e.*, fixed and assessed by Act of Parliament, is not a parliamentary tax (*z*). So an improvement rate made by commissioners under a local Act is not parochial or parliamentary (*a*). But it would seem that a county rate is a *parochial* tax (*b*). No doubt in *Waller v. Andrews* (*c*), where the tenant, by the agreement, was to pay "all outgoings whatsoever, rates, taxes, *scots*, &c., parliamentary and parochial," it was held that an extraordinary assessment, made by the commissioners upon the lands, was within the agreement;

(*v*) See *infra*, Part 4, c. 1, s. 4, Covenants Running with the Land.

(*w*) As to the land-tax, see *infra*, Part 2, Div. 1, c. 1, s. 3, Deductions.

(*x*) See *Hopwood v. Barefoot*, 11 Mod. 238; *Brewster v. Kitchin*, 1 Ld. Raym. 377; *Armfield v. White*, 1 Ry. & M. 246; *Bradbury v. Wright*, 2 Dougl. 624; *Payne v. Burrigge*, 12 M. & W. 727; *Governors of Christ's Hospital v. Harrild*, 2 M. & Gr. 707; *Bennett v. Wormack*, 7

B. & C. 627. See also *infra*, Part 2, Div. 1, c. 1, s. 3, Deductions; *Sweet v. Seager*, 2 C. B. N.S. 189.

(*y*) 2 Dougl. 624.

(*z*) *Palmer v. Earth*, 14 M. & W. 428.

(*a*) *Guardians of Bedford Union v. Bedford Improvement Commissioners*, 7 Exch. 777.

(*b*) *Reg. v. Inhabitants of Aylesbury*, 9 Q. B. 261.

(*c*) 3 M. & W. 312.

but that was upon the ground of its being a *scot*, and not a parliamentary tax. In *Baker v. Greenhill* (d), a landlord was, with other landowners, liable to repair a bridge, *ratione tenuræ*. The tenant of the land had covenanted to pay the rent, "free and clear of and from any land-tax, and all other taxes and deductions whatsoever, either parliamentary or parochial, now already taxed or imposed upon the demised premises, or upon the tenant, his heirs, executors, administrators, or assigns in respect thereof, the landlord's property-tax or duty only excepted." Some local Acts of Parliament, reciting the liability of the landlord *ratione tenuræ*, had enacted that he and the other landowners who were liable should keep the bridge in repair, and had enabled them to raise the requisite moneys by rates among themselves, according to the value of the lands chargeable, and had given them a power to levy the amount, if necessary, by distress. It was held that the liability to contribute to these repairs did not, by the operation of the local Acts, become a parliamentary tax or deduction within the meaning of the covenant of the tenant. Lord Denman, in giving the judgment of the Court, said:—"We are of opinion that the Acts of Parliament for enabling persons interested to raise the necessary funds for the repairs of the bridge by contribution among themselves, do not impose any tax within the meaning of the covenant. The charge was already created, and the Acts merely supply a more convenient mode for raising the necessary funds to meet it." Where a local Act imposed duties of paving upon a landlord, and in default gave power to commissioners to execute the works, and recover expenses from the owner, it was held that the duty, in the first instance, was to *pave*, and not to *pay money*, and the tenant was therefore not liable to his landlord (e); but it is otherwise where a sum of money is levied upon premises (f). Tithe rent-charges are not included in "all taxes and assessments" (g). A covenant to pay taxes on the land does not extend to church and poor rates, for these are *personal charges* (h).

Sometimes the lessor covenants to pay the rates and taxes; sometimes the burden of them is thrown partly on

(d) 3 Q. B. 148.

(e) *Tidswell v. Whitworth*, L. R. 2 C. P. 326, 36 L. J. C. P. 103.

(f) *Thompson v. Lapworth*, L. R. 3 C. P. 149; 37 L. J. C. P. 74; and see *Bird v. Elwes*, L. R. 3 Ex. 255, 37 L. J. Ex. 91; *Crosse v. Raw*, 43 L. J. Ex. 144, L. R. 9 Ex. 209.

(g) *Jeffrey v. Neale*, L. R. 6 C. P. 240; 41 L. J. C. P. 191; *Lockwood v. Wilson*, 43 L. J. C. P. 179.

(h) *Head v. Starkey*, 8 Mod. 314. See *Tidswell v. Whitworth*, L. R. 2 C. P. 326.

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the lessee and partly on the lessor. Such covenants are seldom interfered with by the Legislature. But the property-tax, which the landlord is bound to pay, forms an exception to this rule (i).

Repairs.

The lessee's responsibility for repairs is generally limited by an express covenant (j), which will run with the land (k). Usually there are three covenants by the lessee relating to repairs in a lease of buildings:—First, During the term to repair and keep in repair, &c., the demised premises; secondly, To repair according to notice, with a provision for the lessor to enter and view the premises; thirdly, At the determination of the term to leave the premises in repair.

The covenant to repair generally, and the covenant to repair after notice, have been held to be distinct and independent covenants (l); but they may be so joined as to make one entire covenant (m).

The lessor sometimes enters into a covenant to repair; but without an express covenant he cannot be compelled to repair (n).

Where the lessor covenanted to keep the "main walls, main timbers, and roofs" in repair, it was held that as to the main timbers and roofs, the lessor could have no knowledge of their state of repair without notice, and that therefore notice must be given by the lessee before he could bring an action upon the covenant (o).

On a demise of buildings, a general covenant to repair has been usually construed to comprehend as well the buildings erected by the lessee as the buildings originally demised (p).

(i) 5 & 6 Vict. c. 35, ss. 60, 103, extended and altered by 17 Vict. c. 10, and other Acts. See *infra*, Part 2, Div. 1, c. 1, s. 3, Deductions.

(j) As to obligation to repair arising from the mere relation of landlord and tenant, see Implied Covenants, *post*, p. 99. As to the powers of a Receiver of the Court of Chancery to lay out a sum of money, not more than £30, in repairs, see *Attorney-General v. Vigor*, 11 Ves. 563; *Fletcher v. Dodd*, 1 Ves. Junr. 85; *Morris v. Elme*, *ib.* 139; 15 & 16 Vict. c. 80; *Kerr on Receivers*, p. 149; *Seton on Decrees*, 3d ed. 1014.

(k) See Part 4, c. 1, s. 4, Covenants Running with the Land.

(l) *Baylis v. Le Gros*, 4 C. B. N.S. 537; *Few v. Perkins*, L. R. 2 Ex. 92, 93 L. J. Ex. 54.

(m) *Horsefall v. Testar*, 7 Taunt. 385.

(n) *Neale v. Ratcliffe*, 15 Q. B. 916, 20 L. J. Q. B. 130; *Lannock v. Jones*, 3 Exch. 233; see *Bird v. Elwes*, L. R. 3 Ex. 225, 37 L. J. Ex. 91; where a covenant to repair was held not to extend to cleansing a piece of water.

(o) *Makin v. Watkinson*, L. R. 6 Ex. 25; 40 L. J. Ex. 33; *per Bramwell and Channell*, B.B., *Martin*, B., *diss.*

(p) *Dowse v. Cale*, 2 Vent. 126; *Penry v. Brown*, 2 Stark, 408;

So where a lessee erected fixtures for the purpose of trade, and afterwards took a new lease, to commence at the expiration of his former one, and the new lease contained a covenant to repair, it was held that he was bound to repair the fixtures (*g*).

Under a general covenant to repair, the lessee's liability is not confined to cases of ordinary and gradual decay; but in a demise of buildings it extends to injuries done to them by fire, whether accidental or wilful, or by lightning, tempest, flood, or enemies, &c. (*r*). In consequence of this obligation, it is customary to introduce an exception against such accidents into the covenant (*s*). But a covenant to keep in the same state the woods, lands, and natural productions will not render the lessee liable for any injury which may arise to these from the act of God (*t*).

Under a covenant to repair and *keep* in repair the buildings demised during the term, the lessee is bound to keep them in repair at all times during the term (*u*); and the lessor, upon breach, can, during the term, recover damages commensurate with the injury done to his reversion (*v*).

Where the lessor brought an action for non-repair upon the determination of the lease, and had previously agreed by parol with a new tenant to pull down the buildings, and otherwise to improve the value of the property, it was held that the jury were not bound to give mere nominal damages (*w*).

A general covenant to repair is satisfied by the lessee keeping the premises in substantial repair (*x*). If it is a general covenant to keep old premises in repair, the lessee is

Brown v. Blunden, Skin. 121; *In re Newbery*, White v. Wakley, 28 L. J. Ch. 77, 26 Beav. 17; 17 Penry v. Brown, 2 Stark R. 403; but see *Lant v. Norris*, 1 Burr. 287; *Cornish v. Cleife*, 34 L. J. Ex. 19.

(*g*) *Thresher v. East London Waterworks Co.* 2 B & C. 608. (*r*) *Brooke's Abr. Covenant*, pl. 4; *Walton v. Waterhouse*, 2 Saund. 420; *Bullock v. Dommitt*, 6 T. R. 650; *Brecknock Canal Company v. Pritchard*, 6 T. R. 750. See *post*, *Insurance*, p. 85.

(*s*) But this exception will not bind the landlord to repair. *Weigall v. Waters*, 6 T. R. 488; *Monck v. Cooper*, 2 Ld. Raym. 1477. (*t*) *Shep. Touch.* 173. (*u*) *Luxmore v. Robson*, 1 B. & A. 584. (*v*) *Smith v. Peat*, 9 Exch. 161; *Turner v. Lamb*, 14 M. & W. 412. (*w*) *Rawlings v. Morgan*, 18 C. B. N.S. 776, 34 L. J. C. P. 185. It seems it might have been the same even if the agreement with the new tenant had been binding.

(*x*) *Harris v. Jones*, 1 Moo. & R. 173.

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not liable for dilapidations which are the result of time and the elements (y). But a covenant to keep old premises, and deliver them up in good repair, means to put them into such repair as is suitable to their age and class; and the lessee is not justified in keeping them in bad repair because they were in that condition at the time when the covenant began to operate (z). The sufficiency of the repairs is a question of fact for the jury, who may consider *generally* the state of repair of the premises at the time of the making of the lease (a).

Where a lessee agrees to put the premises in "habitable repair," he is to put them in a state fit for the occupation of the class of persons likely to inhabit them (b). A lessee under a general covenant to repair is not liable for the extra expense of laying a new floor on an improved plan (c). A covenant to repair "all the external parts of the demised premises," includes the partition wall between the premises and an adjoining house, the external parts of the premises being those which form the inclosure of them (d).

Sometimes the covenant is of a conditional nature, and it is part of the agreement that the landlord should in the first place put the premises into good repair (e); and until that is done, the lessee is not liable for repairs (f). But a covenant to repair, "having or taking" sufficient wood, &c., from the premises "for the doing thereof," is an absolute covenant to repair, and not conditional upon there being a sufficient supply of timber (g).

Husbandry

In farming leases (h) it is usual for the lessee to covenant that he will manage his farm in a husband-like manner. The mere relation, however, of landlord and tenant creates an implied obligation to farm according to the custom of the

(y) *Gutteridge v. Munyard*, 1 Moo. & R. 334.

(z) *Payne v. Haine*, 16 M. & W. 541; *Easton v. Pratt*, 33 L. & J. Ex. 233. See *Schroder v. Ward*, 13 C. B. N.S. 410.

(a) *Stanley v. Towgood*, 3 Bing. N. C. 4; *Burdett v. Withers*, 7 A. & E. 136; *Mantz v. Goring*, 4 Bing. N. C. 451; *Young v. Manton*, 6 Scott, 277.

(b) *Belcher v. Mackintosh*, 8 C. & P. 720, 2 Moo. & Ry. 186.

(c) *Saward v. Leggatt*, 6 C. & P. 613.

(d) *Green v. Eales*, 2 Q. B. 229.

(e) See *Slater v. Stone*, Cro. Jac. 645; *Cannock v. Jones*, 3. Exch. 233, 5 Id. 713.

(f) *Neale v. Ratcliff*, 15 Q. B. 916, 20 L. J. Q. B. 220; *Coward v. Gregory*, L. R. 2 C. P. 153, 36 L. J. C. P. 1. See also *Thomas v. Cadwallar*, Willes, 496; *Martyn v. Clue*, 18 Q. B. 661.

(g) *Dean of Bristol v. Jones*, 1 E. & E. 484, 28 L. J. Q. B. 201.

(h) See *Implied Covenants*, *post*, p. 99.

country (i). Sometimes, however, the custom of the country may be excluded by the express provisions of the lease (j). CHAP. IV.

The lease should contain a covenant by the lessee, his ex- Insurance.
cutors, administrators, and assigns, to insure and keep insured during the term the buildings demised for a certain amount in some insurance office (k), in the joint names of the lessor and lessee, or either of them, according to the terms of the covenant (l). The covenant should also contain a clause for the production of the policy, and of the receipt for the premium during the year (m), and a provision that the money recoverable from the insurance office shall be applied in repairing or rebuilding the premises destroyed by fire. But where there is a covenant to repair, the lessee's liability is not limited to the amount of the sum insured (n). A further provision may be made, that if the tenant omit to insure, the landlord may do it, and recover the money paid by distress or otherwise, as for rent in arrear. The ordinary covenant to insure is broken if the lessee fail to keep the premises insured for any time, however short (o). The breach of this covenant is a continuing breach, and the receipt of rent by the lessor after breach waives only that portion of the breach which has then actually occurred (p). If, however, the lessor, by his conduct, leads the lessee to believe that the covenant has been performed, he cannot recover in ejectment for a forfeiture, though there was no dispensation or release from the covenant (q).

By the 22 & 23 Vict. c. 35, ss. 4-8, power was given to a court of equity to relieve against forfeiture for a breach of covenant to insure where no loss or damage had happened, and the breach was accidental and the insurance was still on

(i) *Powley v. Walker*, 5 T. R. 357. See *Implied Covenants*, *post*, p. 99, and *Repairs and Cultivation*, *post*, Part 2, Div. 1, c. 3.

(j) *Webb v. Plummer*, 2 B & Ald. 750; *Hutton v. Warren*, 1 M. & W. 466, 477.

(k) *Doe d. Pitt v. Shewin*, 3 Camp. 134.

(l) *Doe d. Muston v. Gladwin*, 6 Q. B. 953; *Penniall v. Harborne*, 11 Q. B. 368.

(m) *Doe d. Bridger v. Whitehead*, 8 A. & E. 571. See *Toleman v. Portbury*, L. R. 5 Q. B. Ex. Ch. 288, 39 L. J. Q. B. 136.

(n) *Digby v. Atkinson*, 4 Camp. 275.

(o) *Doe d. Pitt v. Shewin*, 3 Camp. 134; *Doe d. Darlington v. Ulph*, 13 Q. B. 204; *Wilson v. Wilson*, 14 C. B. 616; *Doe d. Flower v. Peck*, 1 B. & A. 428; *Hyde v. Watts*, 12 M. & W. 254; *Doe d. Baker v. Jones*, 5 Exch. 498; but see *Doe d. Pitt v. Laming*, 4 Camp. 73.

(p) *Doe d. Muston v. Gladwin*, 6 Q. B. 953. But see this case commented on in *Walrond v. Hawkins*, L. R. 10 C. P. 342; 44 L. J. C. P. 116, *post*, p. 88.

(q) *Doe d. Knight v. Rowe*, Ry. & Moo. 343; *Doe d. Pitman v. Sutton*, 9 C. & P. 706.

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foot. A memorandum of such relief being granted is to be indorsed on the lease, and the same person cannot be relieved more than once, nor can the relief be granted where the forfeiture has been already waived out of court (*r*). The lessor is to have the benefit of an informal insurance, and purchasers of leasehold interests, upon being furnished with receipts for rent up to time of purchase, are protected from forfeitures incurred previously by the lessee, although the lessee still remains liable for breach of covenant. By the 23 & 24 Vict. c. 126, s. 2, the courts of common law had power to grant relief in a summary manner against forfeiture for not insuring in the same manner as the courts of equity.

Not to underlet
nor assign.

In general the lessee also covenants not to underlet nor assign the premises, nor any part thereof, without the written consent or license of the lessor (*s*). If the covenant only restrains the lessee from assigning, he may underlet without his lessor's consent; but although an under-lease is no breach of a covenant not to assign, yet the converse of the proposition cannot be maintained (*t*). Covenants denying the privilege of underletting can only extend to such underletting as would require a license. The exclusive enjoyment, therefore, of a room in the premises by a lodger will not occasion a breach of such a covenant (*u*). Where the lessor is desirous that the possession, as well as the property, should be confined to his lessee, express words prohibiting the privilege of taking in lodgers, or parting with the possession of the premises, or any part thereof, must be contained in the deed (*v*).

Although it is the practice to insert a covenant against underletting and assigning without the lessor's consent, and although such a covenant may be fair and reasonable, yet the better opinion seems to be, that an agreement for a lease, containing a stipulation that the lease to be granted shall contain

(*r*) See *Mills v. Griffiths*, 45 L. J. Q. B. 771.

(*s*) It seems that a covenant of this kind, if inserted in very long leases, might be open to the objection of creating a perpetuity. See *Platt on Covenants*, 404; *Roe d. Hunter v. Galliers*, 2 T. R. 140; *Buckland v. Hall*, 8 Ves. 94; *Church v. Brown*, 15 Ves. 269; *Folkingham v. Croft*, 3 Anst. 701.

(*t*) *Church v. Brown*, 15 Ves. 265; *Doe d. Mitchinson v. Carter*, 8 T. R. 61; *Crusoe d. Blencowe v. Bugby*,

2 W. Bl. 766, 3 Wils. 234; *Kynnersley v. Orpe*, 1 Dougl. 57; *Holford v. Hatch*, ib. 183; *Brewer v. Hill*, 2 Anst. 413; *Roe d. Gregson v. Harrison*, 2 T. R. 425; *Doe d. Holland v. Worsley*, 1 Camp. 20.

(*u*) *Doe d. Pitt v. Lauing*, 4 Camp. 73.

(*v*) *Roe d. Dingley v. Sales*, 1 M. & S. 297; *Marsh v. Curtis*, 2 And. 42, 90; *Doe d. Holland v. Worsley*, 1 Camp. 20; *Church v. Brown*, 15 Ves. 265. See *Williams v. Cheney*, 3 Ves. 61; *Collins v. Silley*, Sty. 265.

all common and usual covenants, will not include this covenant, as common and usual covenants mean such covenants as are incidental to the lease (*w*).

A lease made to the lessee and his assigns, provided he shall not assign, is void; but it would have been good if the proviso had been that he shall not assign without consent (*x*). The former part of this proposition, however, has been denied (*y*). A covenant that the lessee, "his executors or administrators," will not assign, does not bind his assigns (*z*); but it will bind his executors or administrators (*a*).

It has been held in several cases that a condition (*b*) not to assign is not broken by an assignment by operation of law (*c*). But if special words are inserted in the condition to include such case, a forfeiture will ensue (*d*).

A covenant not to assign is broken by the execution of a deed assigning the whole of the term, although the deed purports to be merely an under-lease, reserving rent with powers of re-entry (*e*). In order to create a forfeiture, the assignment must be valid in point of law (*f*). So an advertisement to underlet or assign is no breach (*g*). A covenant contained in the lease of a chophouse not to grant any under-lease or leases, or let, set, assign, transfer, set over, or otherwise part with the premises demised, or the indenture of lease, is not

(*w*) *Henderson v. Hay*, 3 Bro. C. 632; *Church v. Brown*, 15 Ves. 258, 271; *Morgan v. Slaughter*, 1 Esp. 8; *Folkingham v. Croft*, 3 Anst. 700; Judgment of Sir W. Grant, M.R., in *Jones v. Jones*, 12 Ves. 186; *Vere v. Loveden*, 12 Ves. 179; *Brown v. Raymond*, 15 Ves. 528; *Buckland v. Papillon*, L. R. 1 Eq. 447. So also in a mining lease clauses of forfeiture for bankruptcy or for assignment are not "usual covenants." *Hodgkinson v. Crowe*, 44 L. J. Ch. 238; L. R. 10 Ch. 622.
(*x*) *Shep. Touch*, 123 n.

(*y*) *Denis v. Laurie*, Hardr. 427; *Wetherall v. Gearing*, 12 Ves. 511.

(*z*) *Doe d. Cheere v. Smith*, 5 Taunt. 795; *Bally v. Wells*, 3 Wils. 33; *Paul v. Nurse*, 8 B. & C. 486.

(*a*) *Roe d. Gregson v. Harrison*, 2 T. R. 425.

(*b*) As to the difference between "conditions" and "covenants," see *post*, s. 8.

(*c*) See *Doe d. Goodbehere v.*

Cavan, 3 M. & S. 353; *Doe d. Mit-chinson v. Carter*, 8 T. R. 57; *Doe d. Lord Anglesea v. Rugeley*, 6 Q. B. 107; *Croft v. Lumley*, 5 E. & B. 648, 682, and 6 H. of L. Cas. 672; *Slipper v. Tottenham Junction Railway Co.*, L. R. 4 Eq. 112; 36 L. J. Ch. 841; *Bailey v. De Crespigny*, L. R. 4 Q. B. 180.

(*d*) *Roe d. Hunter v. Galliers*, 2 T. R. 133; *Rex v. Topping*, M'Cel. & J. 544; *Davis v. Eyton*, 7 Bing. 154; *Rouch v. The Great Western Railway Co.*, 1 Q. B. 51; *Doe d. Wyndham v. Carew*, 2 Q. B. 317; *Doe d. Lloyd v. Ingleby*, 35 M. & W. 465.

(*e*) *Farmenter v. Webber*, 8 Taunt. 593; *Pierce v. Corrie*, 5 Bing. 24; *Woollaston v. Hakewill*, 3 M. & G. 297; *Thorne v. Woolcombe*, 3 B. & Ad. 586.

(*f*) *Doe d. Lloyd v. Powell*, 5 B. & C. 308.

(*g*) *Gourlay v. Duke of Somerset*, 1 V. & B. 68.

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Whether a bequest, or, as the books call it, the devise of a term without the landlord's assent, is a breach of a covenant not to assign without license, appears doubtful. The law on the subject continued uniform up to the time of James I., namely, that a devise was a breach of the condition (*i*). But in the time of Charles I. a contrary doctrine was established, and this doctrine appears to have been since adhered to (*j*). In this doubtful state of the law, it would be as well to provide for the case of a devise by express words in the covenant. If the covenant contain an exception in favour of assignment by will, it would seem that the executors are not within the exception, and therefore not at liberty to sell for payment of debts without license of the lessor (*k*).

Where the condition was that the tenant should not without consent underlet any part of the land or "permit any other person to occupy" it, and the tenant underlet for a definite period, it was held that this was a breach of the covenant not to underlet, and not of the condition not to permit another person to occupy; and it seems that the meaning of this condition is, that the tenant would not permit another person to be in possession for an unascertained time, and that if he did, there would be no continuing breach (*l*).

A letting of part of the demised premises is a breach of a covenant not to let the demised premises, or any part or parcel thereof (*m*). So where the covenant was not to assign the whole or any part, and the lessor himself entered upon part, and the lessee afterwards assigned, it was held to be a breach of the covenant (*n*). An assignment by one joint owner to another upon dissolution of partnership is a breach of covenant not to assign (*o*).

(*h*) *Doe d. Pitt v. Laming*, 1 Ry. & M. 36; *Doe d. Pitt v. Hogg*, 4 Dow. & Ry. 226. See *Doe d. Goodbehere v. Bevan* 3 M. & S. 353.

(*i*) *Lord Windsor v. Bury*, Dyer, 45 b; *Knight v. Mory*, Cro. Eliz. 60; *Barry v. Stanton*, Cro. Eliz. 330; *Berry v. Taunton*, Cro. Eliz. 331; *Parry v. Harbert*, Dyer, 45 b; *Dumppor v. Syma*, Cro. Eliz. 817; *Huton v. Huton*, Cro. Jac. 74.

(*j*) *Fox v. Swann*, Stg. 482, 483; *Crusoe d. Blencowe v. Bugby*, 3 Will. 237. See the judgment of

Bailey, J., in *Doe d. Goodbehere v. Bevan*, 3 M. & S. 361. In *Doe d. Evans v. Evans*, 9 A. & E. 719, the point was raised, but not decided.

(*k*) *Per Mansfield, C.J.*, in *Lloyd v. Crisp*, 5 Taunt. 249.

(*l*) *Walrond v. Hawkins*, 44 L. J. C. P. 116; L. R. 10 C. P. 342.

(*m*) *Roe d. Dingley v. Sales*, 1 M. & S. 207.

(*n*) *Collins v. Sillye*, Style, 265.

(*o*) *Varley v. Coppard*, L. R. 7 C. P. 505.

At common law it was held that if a lessor licensed one assignment, the condition not to assign without license was at an end for ever, and the assignee might afterwards assign without license (*p*). And this has been held to be the case even where the license was to assign to a particular person (*q*). This law is still in force with reference to covenants and licenses contained in leases made before August 1859 (*r*). But the license, in order to put an end to the condition, must be such a license as is contemplated by the instrument. Thus where the condition is not to assign without license in writing, a parol license is no dispensation (*s*), unless such parol license is used as a snare and under circumstances which amount to fraud, in which case equity would relieve if the lessee had been induced to underlet by the conduct of the lessor, or if the under-lessee by relying on the parol license had suffered any damage (*t*). So also where there is an exception in favour of assignment by will, the condition is still in force after an assignment by will (*u*).

According to the general principle of law that long acquiescence in any adverse claim of right is good ground on which a jury may presume that the claim had a legal commencement, it has been held that a license may be presumed to have been given according to the terms of the condition. Thus upon proof of an uninterrupted sub-lease of the premises for more than twenty years, to the knowledge of the lessor, and contrary to the condition of the lease, the Court held that the jury ought to be directed to presume that a license in writing had been duly given (*v*).

Now, however, by 22 & 23 Vict. c. 35, s. 1 (*w*), it is enacted, that "Where any license to do any act which, without such license, would create a forfeiture, or give a right to re-enter, under a condition or power reserved in any lease heretofore granted, or to be hereafter granted, shall at any time after the passing of this Act be given to any lessee or his assigns, every such license shall, unless otherwise expressed, extend only to the permission actually given, or to any specific breach of any proviso or covenant made or to be made, or to

(*p*) *Dumport's case*, 1 Smith's L. C. 5th edit. 28. See notes 31.

(*q*) *Brummel v. Macpherson*, 14 Vea. 173.

(*r*) See 22 & 23 Vict. c. 35, *infra*.

(*s*) *Roe v. Harrison*, 2 T. R. 425; *Macher v. Foundling Hospital*, 1 V. & B. 191.

(*t*) *Richardson v. Evans*, 3 Madd. 218.

(*u*) *Lloyd v. Crispe*, 5 Taunt. 249, 254; *Mason v. Corder*, 7 Taunt. 9.

(*v*) *Gibson v. Doeg*, 2 H. & N. 613. See also *Doe d. Sheppard v. Allen*, 3 Taunt. 78; *Doe d. Boscawen v. Bliss*, 4 Taunt. 735.

(*w*) See also 23 & 24 Vict. c. 38, as to waiver, Part 3, c. 3, s. 2.

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the actual assignment, under-lease, or other matter thereby specifically authorised to be done, but not so as to prevent any proceeding for any subsequent breach (unless otherwise specified in such license); and all rights under covenants, and powers of forfeiture and re-entry in the lease contained, shall remain in full force and virtue, and shall be available as against any subsequent breach of covenant or condition, assignment, under-lease, or other matter not specifically authorised, or made dispunishable by such license, in the same manner as if no such license had been given; and the condition and right of re-entry shall be and remain in all respects as if such license had not been given, except in respect of the particular matter authorised to be done. Where, however, the lessor gives his license to underlet, and the tenant thereupon underlets, and the under-lessee assigns, that is no breach (x).

By sect. 2 :—"Where in any lease heretofore granted, or to be hereafter granted, there is or shall be a power or condition of re-entry on assigning or underletting, or doing any other specified act without license, and a license, at any time after the passing of this Act, shall be given to one of several lessees or co-owners to assign or underlet his share or interest, or to do any other act prohibited to be done without license, or shall be given to any lessee or owner, or any one of several lessees or owners, to assign or underlet part only of the property, or to do any other such act as aforesaid, in respect of part only of such property, such license shall not operate to destroy or extinguish the right of re-entry in case of any breach of the covenant or condition by the co-lessee or co-lessees, or owner or owners, of the other shares or interests in the property, or by the lessee or owner of the rest of the property (as the case may be), over or in respect of such shares or interests or remaining property, but such right of re-entry shall remain in full force over or in respect of the shares or interests or property not the subject of such license."

Sometimes a condition is inserted that the lessor shall not

(x) *Williamson v. Williamson*, 43 L. J. Ch. 738. Sometimes in leases it is doubtful whether the under-lessee is not bound by his under-lease to obtain the consent not of his own lessor but of the original lessor before assigning; but in *Williamson v. Williamson*, *supra*, Lord Justice Mellish said, "It would be a most arbitrary and extraordinary provision (I do not say it would not be good if you could show it in express terms) to require to an assignment of the lease the consent of a different person from the person who, as owner of the reversion, can alone act upon the proviso for re-entry if the covenant not to assign without consent is broken."

withhold his license to assign unreasonably or vexatiously (y), or arbitrarily (z). It is no answer to a suit for specific performance that it does not appear that the landlord has given his consent to the assignment (a). As to a waiver of the forfeiture by the lessor, see *infra*, Part 3, c. 3, s. 2.

Leases very generally contain a covenant restraining the exercise of certain specified trades on the premises, and sometimes they go further and totally prohibit the carrying on of all trades and businesses whatsoever; also leases often contain a covenant to prevent any sale by auction in the house (b). Covenants of this kind, when they affect the mode of occupation or enjoyment of the land demised, run with the land (c). Covenants in restraint of trade in a trading locality, and restrictions against particular trades, are not common and usual covenants (d). But where a public-house was described as held at a certain net rent, under common and usual covenants, and the lease contained a proviso for re-entry by the lessor, if any business but that of a victualler should be carried on in the house, it was held, upon proof that such a proviso was inserted in at least six out of ten leases of public-houses, that the proviso was common and usual (e). A covenant not to sell spirituous liquors, will not include wine (f). A covenant not to use a house as a beerhouse, is not broken by the sale, under a license, of beer by retail to be consumed on the premises (g). Nor is a covenant not to carry on the business of a wholesale or retail confectioner broken by a grocer who sells a particular kind of sweetmeat sold by confectioners (h). As to the effect of a license granted and waiver in case of forfei-

Not to carry on certain trades.

(y) *Lehmann v. McArthur*, L. R. 3 Eq. 746, 3 Ch. Ap. 496.

(z) *Trelour v. Biggs*, 43 L. J. Ex. 95; L. R. 9 Ex. 151.

(a) *Leitch v. Simpson*, 5 Ir. R. Eq. 613.

(b) *Parker v. White*, 32 L. J. Ch. 520, 1 H. & M. 167. As to the person upon whom the burden of proof lies, see *Toleman v. Portbury*, L. R. 5 Q. B. Ex. Ch. 288, 39 L. J. Q. B. 136.

(c) *Mayor of Congleton v. Pattison*, 10 East. 136; *Wilkinson v. Rogers*, 2 De Gex J. & S. 62. When they are collateral, and relate to something to be done elsewhere than on the land demised, they do not run with the land; *Thomas v. Hayward*, L. R. 4 Ex. 311. Such covenants bind assigns in equity,

who have actual or constructive notice of them. See *Jay v. Richardson*, 30 Beav. 563; *Wilson v. Hart*, L. R. 1 Ch. Ap. 463; *Catt v. Tourle*, L. R. 4 Ch. Ap. 654, 38 L. J. Ch. 665; *Fielden v. Slater*, L. R. 7 Eq. 523. See *infra*, Part 4, c. 1, s. 4, Covenants Running with the Land.

(d) *Wilbraham v. Livsey*, 18 Beav. 206; *Probert v. Parker*, 3 Myl. & Cr. 280. See *ante*, Covenants not to Underlet, p. 86.

(e) *Bennet v. Womach*, 7 B. & C. 627.

(f) *Fielden v. Slater*, *supra*.

(g) *London and North-Western Railway Co. v. Garnet*, L. R. 9 Eq. 26.

(h) *Lumley v. Metropolitan Ry. Co.*, 34 L. T. N.S. 774, D. C. A.

CHAP. IV. ture, see *supra*, pp. 87, 88, and *infra*, s. 9, and Part 3, c. 3; s. 2.

Trading with particular persons, or within a particular radius.

Sometimes the lessee covenants that he will deal with the lessor alone, as in the case where a public-house-keeper agrees to buy all his beer of his landlord. Such contracts are not favoured by the Courts, and it must be shown that the lessor faithfully performed his part of the contract by supplying good beer (*i*). Such covenants are binding on an assignee with notice (*j*).

Where, upon a lease of limeworks, it was stipulated that the lessor should furnish, and the lessee take, coals from certain collieries, the collieries not furnishing sufficient, it was held that the lessee could not go elsewhere for the whole of his coals, but could only supply the deficiency (*k*).

A covenant is sometimes inserted in a lease to prevent one or other of the parties from exercising his trade within a certain radius (*l*). The covenant will not be good if it be to the prejudice of the public generally; and, therefore, it must only affect a limited area, and must be made for a *bona fide* consideration (*m*). But if there be no limit as to space, the contract is void, whether with or without consideration (*n*). In the case of *Horner v. Graves* (*o*), which turned on the question of space, it was stated that whatever restraint is larger than is necessary for the protection of the party is oppressive, and therefore unreasonable. This proposition was supported by the Court of Exchequer Chamber (*p*), but they held, in the case before them, that there being no limit as to time did not make the contract unreasonable. But in the subsequent case of *Archer v. March*, in which there was no limit as to time, the Court of Queen's Bench stated that the principle of the decision of the Court of Exchequer Chamber

(*i*) *Thornton v. Sherratt*, 8 Taunt. 529; *Holcombe v. Hewson*, 2 Camp. 391; *Jones v. Edney*, 3 Camp. 285.

(*j*) *Wilson v. Hart*, L. R. 1 Ch. Ap. 463; *Catt v. Tourle*, L. R. 4 Ch. Ap. 654, and see *ante*, p. 91, n. (c).

(*k*) *Wight v. Dicksons*, 1 Dow. 141.

(*l*) The distance is to be measured as the crow flies. See *Duigan v. Walker*, 1 Johns. 446, 28 L. J. Ch. 867; *Reg. v. Saffron Walden*, 9 Q. B. 76; *Jewel v. Stead*, 6 E. & B. 350.

(*m*) *Davis v. Mason*, 5 T. R. 118; *supra*.

Morris v. Coleman, 18 Ves. 438; *Hitchcock v. Coker*, 6 A. & E. 438; *Archer v. Marsh*, 6 A. & E. 959; *Pilkington v. Scott*, 15 M. & W. 657; *Procter v. Sargent*, 2 M. & E. 20; *Rannie v. Irving*, 7 M. & E. 969; *Pemberton v. Vaughan*, 10 Q. B. 87; *Elves v. Crofts*, 10 C. B. 241; *Mumford v. Gething*, 7 C. B. N.S. 305, 29 L. J. C. P. 105.

(*n*) *Hinde v. Gray*, 1 M. & G. 195. But see the *Leather-cloth Company v. Lorrant*, L. R. 9. Eq. 345, 39 L. J. Ch. 86.

(*o*) 7 Bing. 735.

(*p*) See *Hitchcock v. Coker*,

was, that the restraint of trade in that case could not really be injurious to the public, and that the parties must act on their view of what restraint may be adequate to the protection of the one, and what advantage a fair compensation for the sacrifice made by the other. They also stated that *Horner v. Graves* was overruled by the decision in *Error (q)*. Distance is measured by the shortest line which can be drawn on a map from one place of business to the other (*r*).

The Court will not consider whether the consideration is adequate to the restraint, though there must be some consideration (*s*).

It seems that an injunction will issue to restrain a man who, as foreman or workman for another person, engages in a trade contrary to his covenant (*t*); but where the covenant was not to carry on a business "in his own name, or that of any other person," it was held that it was no breach to act as manager for another at a weekly salary (*u*).

Although an implied covenant for quiet enjoyment in a lease arises on the words "demise," "let," &c. (*v*), the lease in general contains an express covenant by the lessor, which may be either qualified or unqualified. A form of qualified covenant is given by the second schedule of the 8 & 9 Vict. c. 124, and is as follows:—"And the lessor doth hereby, for himself, his heirs, executors, administrators, and assigns, covenant with the said lessee, his executors, administrators, and assigns, that he and they, paying the rent hereby reserved, and performing the covenants hereinbefore on his and their part contained, shall and may peaceably possess and enjoy the said demised premises for the term hereby granted, without any interruption or disturbance from the said lessor, his executors, administrators, or assigns, or any other person or persons lawfully claiming by, from, or under him, them, or any of them."

Under a covenant of this description, any subsequent ejectment, or other interruption or disturbance, by any person who does not claim "by, from, or under" the lessor, would be no breach (*w*). So under such a covenant, a distress for previous

(*q*) *Archer v. Marsh*, 6 A. & E. 959. It does not appear that the case of *Horner v. Graves* was overruled, but it was distinguished from *Hitchcock v. Coker*.

(*r*) *Moufflet v. Cole*, 42 L. J. Ex. 8; L. R. 8 Ex. 32.

(*s*) See the above cases, and *Pilkington v. Scott*, *supra*.

(*t*) *Newling v. Dobell*, 19 L. T. N.S. 408.

(*u*) *Allan v. Taylor*, 39 L. J. Ch. 627.

(*v*) See *Implied Covenants*, *post*, p. 99.

(*w*) Year Book, 26 Hen. VIII. 3 b; *Merrill v. Frame*, 4 Taunt. 329.

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A general or unqualified covenant extends to the acts of all persons having lawful title, and is not confined to the acts of persons claiming through the lessor. Such covenants generally purport to assure against disturbance by "any person or persons whomsoever;" but these words will not include persons having no title; for "the law shall never judge that a man covenants against the wrongful acts of strangers, unless the covenant be full and express to that purpose" (*y*). A covenant against the acts of a particular person by name will, however, include the acts of that person, whether he has title or not (*z*). And if there be express words in the covenant showing a clear intent to protect the lessee from unlawful as well as from lawful interruption—as, for instance, that the lessee shall enjoy against all "claiming, or pretending to claim," any right, &c.—the lessor will be bound by the express words (*a*). So when the lessor is a party named in the covenant, it will extend to all interruptions by him, whether rightful or wrongful (*b*). In *Smith v. Compton*, it was said that a covenant for title, unqualified in itself, and unconnected by words with a qualifying covenant in the lease, must in a court of law be regarded as an absolute covenant for title (*c*).

Where the lessor covenanted that he had not done, nor permitted, nor suffered to be done, any act, &c., it was held that consenting to an act which he could not prevent was not a breach (*d*).

(*x*) *Stanley v. Hayes*, 3 Q. B. 105.
(*y*) Year Book, 22 Hen. VI. 52 b; 32 Hen. VI. 32 b; *Hayes v. Bickerstaff*, Vaugh. 118; *Tisdale v. Essex*, Hob. 34; *Chantflower v. Priestley*, Cro. Eliz. 914; *Broking v. Cham*, Cro. Jac. 425; *Hammond v. Dod*, Cro. Car. 5; *Nokes' case*, 4 Rep. 80 b; *Jerritt v. Weare*, 3 Price, 595. See *Dudley v. Folliott*, 3 T. R. 584.

(*z*) *Foster v. Mapes*, Cro. Eliz.; 212; *Fowle v. Welsh*, 1 B. & C. 29; *Nash v. Palmer*, 5 M. & S. 374; *Shep. Touch*, 166; *Perry v. Edwards*, 1 Stra. 400. See also *Rashleigh v. Williams*, 2 Vent. 62.

(*a*) *Southgate v. Chaplan*, in C. P. Com. 230 S.C.; *Chaplan v. Southgate*, in K. B. 10 Mod. 383; *Lucy v. Levington*, 1 Vent. 175; *Hunt v. Allen*, Wynch. 25.

(*b*) *Lloyd v. Tomkies*, 1 T. R. 671; *Andrews v. Paradise*, 8 Mod. 319; *Shaw v. Stenton*, 2 H. & N. 858.

(*c*) *Smith v. Compton*, 3 B. & Ad. 189, overruling *Milner v. Horton*, M'Clel. 647; and see *Browning v. Wright*, 2 B. & P. 13, where the qualifying covenants were connected with the unqualified covenant.

(*d*) *Hobson v. Middleton*, 6 B. & C. 295.

A breach of this covenant may be made either by proceedings in law interfering with the title (e) or by other acts. Where the covenant was that the lessee should enjoy the estate discharged of tithes, it was held that the covenant was broken by a suit for the tithes, although the term was at an end (f); but a suit for waste, which only interferes with a particular mode of enjoying the land, is not a breach of the covenant for quiet enjoyment (g). Nor is the obtaining an injunction against an under-tenant for using the premises in a manner disapproved of by the landlord, but not contrary to any covenant by the lessee; for a covenant for quiet enjoyment is regarded as a covenant to secure title and possession, and not to guarantee to the tenant that he may use the land for any purpose not mentioned in the restrictive covenant upon his part (h).

An act done in the assertion of title (i), and which disturbs the lessee in the full enjoyment of his property, amounts to a breach; as, for instance, the erection of a gate so as to interfere with the use of a close (j), or digging a quarry so as to interfere with the working of a mine (k).

A covenant for the renewal of a lease runs with the land (l). But a covenant for a perpetual renewal, entered into by a lessor having a limited interest, does not bind the estate (m). A covenant for renewal which would create a perpetuity in the heirs of the body of a particular person is invalid (n). And in general the Courts will not construe a covenant for renewal to be perpetual (o), unless the intention of the parties is clearly expressed (p). And where there is a proviso in

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leases.

(e) *Calthorp v. Heyton*, 2 Mod. 54; *Hunt v. Danvers*, T. Raym. 370.

(f) *Laming v. Laming*, Cro. Eliz. 316.

(g) *Morgan v. Hunt*, 2 Ventr. 215.

(h) *Dennett v. Atherton*, 41 L. J. Q. B. Ex. Ch. 165; L. R. 7 Q. B. 316; *Spencer v. Marriot*, 1 B. & C. 457; *Sugd. Vend. & Pur.* 14th ed. 602.

(i) *Sedden v. Senate*, 13 East. 72.

(j) *Andrews v. Paradise*, 8 Mod. 318.

(k) *Shaw v. Stenton*, 2 H. & W. 858. As to remedies for a breach, see Part 3, Div. 2, c. 1, s. 2.

(l) *Earl of Shelburn v. Biddulph*, 6 Bro. P. C. 363.

(m) *Brereton v. Tuohey*, 8 Ir. Ch. R. 190; *Postlethwaite v. Lewthwaite*, 2 J. & H. 237, 31 L. J. Ch. 584.

(n) *Hope v. Mayor of Gloucester*, 7 De G. M. & G. 647, 25 L. J. Ch. 145.

(o) *Baynham v. Guy's Hospital*, 3 Ves. 298; *Smyth v. Nangle*, 7 Cl. & Fin. 405; *Brown v. Tighe*, 2 Cl. & Fin. 396.

(p) *Hare v. Burgess*, 4 Kay & J. 45, 27 L. J. Ch. 86; *Bridges v. Hitchcock*, 1 Bro. P. C. 522; *Furnival v. Crewe*, 3 Atk. 83.

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With respect to what will create a forfeiture of the right of renewal, that will depend upon the terms of the covenant, and whether they have been sufficiently carried out or not (*r*).

The Court of Chancery will not generally relieve a lessee from the consequences of his laches (*s*); and where there is a covenant to renew, provided the covenants are kept by the lessee (*t*), or to renew at the end of the term, if it should not sooner determine through the lessee's default (*u*), the Court will not decree a specific performance of the covenant to renew, the tenant not having performed his part of the agreement.

As to renewals to minors and married women, see the 11 Geo. IV. & 1 Will. IV. c. 65, *ante*, pp. 24, 25.

In order to prevent the inconvenience arising from the refusal of under-lessees to surrender their under-leases, and so to prevent the renewal of leases, it is enacted by the 4 Geo. II. c. 28, s. 6, that "in case any lease shall be duly surrendered, in order to be renewed, and a new lease made and executed by the chief landlord or landlords, the same new lease shall, without surrender of all or any the under-leases, be as good and valid, to all intents and purposes, as if all the under-leases derived thereout had been likewise surrendered at or before the taking of such new lease; and all and every person and persons in whom any estate for life or lives, or for years, shall from time to time be vested by virtue of such new lease, and his, her, and their executors and administrators, shall be entitled to the rents, covenants, and duties, and have like remedy for recovery thereof; and the under-lessees shall hold and enjoy the messuages, lands, and tenements, in the respective under-leases comprised, as if the

(*q*) 4 Jarm. Prec. 393, 3d edit.; 440; Rubery v. Jervoise, 1 T. R. Tritton v. Foote, 2 Bro. O. C. 636, 229.

2 Cox, 174; Iggulden v. May, 7 East. 237; Hide v. Skinner, 2 P. Wins. 197.

(*r*) See Bsynham v. Guy's Hospital, *supra*; Eaton v. Lyon, 3 Ves. 600; Bogg v. Midland Railway Co., L. R. 4 Eq. 310, 313, 36 L. J. Ch.

(*s*) 4 Jarm. Prec. 397, 3d edit.

(*t*) Job v. Banister, 2 Kay & J. 374, 26 L. J. Ch. 125; Finch v. Underwood, 45 L. J. Ch. 522.

(*u*) Thompson v. Guyon, 5 Sim. 56, cited 2 K. & J. 381.

original leases out of which the respective under-leases are derived had been still kept on foot and continued; and the chief landlord and landlords shall have and be entitled to such and the same remedy, by distress or entry in and upon the messuages, lands, tenements, and hereditaments comprised in any such under-lease, for the rents and duties reserved by such new lease, so far as the same exceed not the rents and duties reserved in the lease out of which such under-lease was derived, as they would have had in case such former lease had been still continued, or as they would have had in case the respective under-leases had been renewed under such new principal lease; any law, custom, or usage to the contrary hereof notwithstanding."

The effect of the above section is to leave untouched the sub-lease created before a surrender, but to give the lessee a right to surrender, notwithstanding the sub-lease (v).

By the 8 & 9 Vict. c. 106, s. 9, when the reversion expectant on a lease merges, the estate which confers the next vested right shall be deemed the reversion for some purposes (w). As at common law the obligations of the parties were incident to the immediate reversion, and were extinguished upon merger of the reversion, the above statute was passed substituting the next vested right for the reversion (x).

We have already seen (y) that a covenantor will be held Mining leases. liable for the breach of his covenant, even although the performance of it has become impossible, and this has been held to be the case in mining leases where it was agreed that a certain amount of coal should be worked yearly, or that a minimum rent should be paid representing a minimum amount of coal which the lessee agreed to work; for, although the whole of the coal was exhausted, yet the lessees were bound to pay the minimum rent (z). But where the covenant simply

(v) See *Cousins v. Phillips*, 3 H. & C. 892, 35 L. J. Ex. 84. See also *Doe d. Palk v. Malchetti*, 1 B. & Ad. 715.

(w) The words of the sect. are:—That when the reversion expectant on a lease, made either before or after the passing of this Act, of any tenements or hereditaments, of any tenure shall, after the said first day of October one thousand eight hundred and forty-five, be surrendered or merge, the estate which shall, for the time being, confer as against the tenant under the same lease the next vested right to the same tene-

ments or hereditaments, shall, to the extent and for the purpose of preserving such incidents to and obligations on the same reversion, as, but for the surrender or merger thereof, would have subsisted, be deemed the reversion expectant on the same lease.

(x) *Webb v. Russell*, 3 T. R. 393; *Stokes v. Russell*, ib. 678; *Woolley v. Gregory*, 2 Y. & J. 536.

(y) *Ante*, p. 78.

(z) *Marquis of Bute v. Thompson*, 13 M. & W. 487; *Jervis v. Tomkinson*, 1 H. & N. 195.

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was that the tenant should dig a certain quantity of clay in the year at a certain rate, and there was no alternative stipulation that he should pay for any deficiency, it was held that he was not liable for a breach of covenant, there being no clay to get (a).

Where the agreement was to continue working a colliery so long as it was fairly workable, Coleridge, J., directed the jury that the defendants were not obliged to go on working so long as there was any coal to be found, and were not obliged to work the coal at a dead loss (b). Where there was a demise of all the coal-mines and seams of coal, and also all the mines, seams, veins, or beds of ironstone or fire-clay found in connection with such coal seams as are workable as coal seams, and it appeared that a certain seam was workable at a profit when both coal and fire-clay were taken into account, it was held that this seam was workable as a coal seam, and, therefore, was within the terms of the demise (c). Where lessees covenanted to work mines in a proper and workmanlike manner, and to deliver up at the end of the term the works, seams, and veins of coal in good repair and condition, so that the said coal works might be continued, it was held that they might work by instroke from an adjoining pit, and not sink a shaft; that they were not liable to damages for not working the coal continuously; and that they were not bound to keep up a barrier to prevent water running from their original colliery into the demised colliery (d). But where lessees had covenanted to sink shafts in a salt-mine, and to work the mine in a workmanlike manner, and they never sank any shaft at all, and never worked the mine at all, they were held liable (e). Where a lease was to become void if the tenant ceased working for two years, it was held that a mere colourable and fraudulent working would not prevent a forfeiture (f). Where the demise was of all mines which then had been or thereafter should be opened, and there was a covenant to work the said mines in a proper and workmanlike manner, it was held there was no breach, as no mines had ever been opened (g).

(a) Lord Clifford v. Watts, 40 L. J. C. P. 36, L. R. 5 C. P. 577.

(b) Jones v. Shears, 7 C. & P. 346.

(c) Carr v. Benson, L. R. 3 Ch. 544.

(d) Jegon v. Vivian, L. R. 6 Ch. 742, 40 L. J. Ch. 389.

(e) Jervis v. Tomkinson, *supra*. This case does not seem to have been referred to in Jegon v. Vivian, *supra*.

(f) Doe d. Bryan v. Banks, 4 B. & A. 401.

(g) Quarrington v. Arthur, 10 M. & W. 335.

See also, with regard to mining reservations, *ante*, p. 61.

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(b.) IMPLIED COVENANTS.

Implied covenants, and covenants *in law*, are such covenants Implied cove-
in deed as are not *express* covenants. There are many implied nants and
covenants which are not covenants in law, and which differ covenants in
only from express covenants by reason of the obscurity with law.
which the intention of the parties is expressed (*h*).

A covenant in law "is an agreement which the law infers or implies from the use of certain words having a known legal operation in the creation of an estate; so that, after they have had their primary operation in creating the estate, the law gives them a secondary force, by implying an agreement on the part of the grantor to protect and preserve the estate so by those words already created" (*i*).

Such covenants cease with the estate of the lessor (*j*), but during the continuance of the estate, the covenant will run with the land (*k*).

It is a maxim of the law that "*expressum facit cessare tacitum*," and, therefore, an express covenant will control an implied covenant of the same nature (*l*).

Covenants may be implied from what appears to be the general intent of the parties. Thus a recital in a deed may amount to an implied covenant upon which an action may be maintained (*m*).

In the case of a lease of lands in which are the words Payment of rent.
"yielding and paying" so much rent, this is an agreement

(*h*) *Williams v. Burrell*, 1 C. B. 429. 10 Q. B. 135, 141; *Deering v. Farrington*, 1 Ld. Raym. 14, 19; *Mathew v. Blackmore*, 1 H. & N. 762.

(*i*) *Per Tindal, C.J.*, in *Williams v. Burrell*, 1 C. B. 429.

(*j*) *Swan v. Stransham, Dyer*, 257 a, 1 Leon. 179, cited 6 Bing. 666; *Penford v. Abbott*, 32 L. J. Q. B. 67.

(*k*) *Bac. Abr. tit. Covenant*, (E) 5; *Vyvyan v. Arthur*, 1 B. & C. 410.

(*l*) *Merrill v. Frame*, 4 Taunt. 329; *Line v. Stephenson*, 5 Bing. N. C. 183; *Standen v. Christmas*, 816.

(*m*) *Severn v. Clark*, 2 Leon. 122; *Hollis v. Carr*, 2 Mod. 87; *Barfoot v. Freswell*, 3 Keb. 465; *Sampson v. Easterby*, 9 B. & C. 505, in error, 6 Bing. 644; *Saltoun v. Houston*, 1 Bing. 433; *Farrall v. Hilditch*, 5 C. B. N.S. 840. See also *Lay v. Mottram*, 19 C. B. N.S. 479; *Aspdin v. Austin*, 5 Q. B. 671; *Sharp v. Waterhouse*, 7 E. & B. 816.

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for the payment of rent which amounts to a covenant, and an action lies for the non-payment (*n*).

Repairs.

In the absence of any express covenant, an implied one arises, on the part of the lessee, that he will use the buildings demised in a tenant-like and proper manner (*o*).

An express covenant to repair will control an implied one (*p*); but, if not inconsistent with each other, both may stand (*q*). As to its effect upon an implied covenant to farm, &c., according to the custom of the country, see *infra*.

It was held in *Smith v. Marrable*, that it was an implied condition in the letting of a furnished house that it should be fit for habitation (*r*); but it was subsequently decided that there is no implied condition that a house should be fit for the purposes for which it is let (*s*), and the same has been held upon a demise of land or herbage (*t*). But where a furnished house was let, subject to an express condition that it was fit for occupation, the condition was held broken by the house being infested by bugs (*u*). In a very recent case, however, the doctrine in *Smith v. Marrable*, which it is submitted is consistent with law and good sense, has been upheld (*v*).

So also there is no implied covenant on the part of the lessor that he will do any repairs whatever (*w*); and if the landlord contract to do the repairs, there is no implied agreement that upon breach the tenant may quit (*x*), or that the tenant may do the repairs and deduct the amount from his rent (*y*).

(*n*) *Hellier v. Casbard*, 1 Sid. 626; *Porter v. Swetnam*, Styles, 406. See also *Giles v. Hooper*, Carth. 135.

(*o*) *Leach v. Thomas*, 7 C. & P. 327; *Harnett v. Maitland*, 16 M. & W. 387; *Yellowby v. Gower*, 11 Exch. 294; *Morrison v. Chadwick*, 7 C. B. 266; *White v. Nicholson*, 4 M. & G. 95.

(*p*) See *ante*, Covenant for Quiet Enjoyment, p. 93.

(*q*) *White v. Nicholson*, 4 M. & G. 95.

(*r*) 11 M. & W. 5.

(*s*) *Hart v. Windsor*, 12 M. & W. 68. It is no answer to a claim for rent that the premises have become unfit for habitation, and that the landlord, having refused to repair, the tenant has given up possession.

Murray v. Mace, 8 Ir. R. C. L. 396.

(*t*) *Sutton v. Temple*, Id. 52; *Erskine v. Adeane*, L. R. 8 Ch. 756; 42 L. J. Ch. 835.

(*u*) *Campbell v. Lord Wenlock*, 4 F. & F. 716.

(*v*) *Wilson v. Finch Hatton*, L. R. 2 Ex. D. 336; *Kelly, C.B.*, and *Pollock v. Huddleston*, B.B.

(*w*) *Arden v. Pullen*, 10 M. & W. 321; *Gott v. Gandy*, 2 E. & B. 845; *Pomfret v. Ricroft*, 1 Wms. Saund. 357. See *Erskine v. Adeane* as to

repair of fences, *post*, Part II. Div. I. c. 3.

(*x*) *Surplice v. Farnsworth*, 7 M. & G. 576.

(*y*) *Howlett v. Strickland*, Cowp. 56; *Smith v. Mapleback*, 1 T. R. 446.

There were two adjoining houses, and under part of one was an archway, so that the wall separating the two houses was as to the upper part a party wall between the two houses, but as to the lower part was a party wall between the archway and one of the houses. The defendants were freeholders of both houses. They let both houses, the archway remaining in their own possession; but the party wall between the archway and one house was in the joint occupation of the defendants and the lessee of that house, and it gave way and injured the other house, which was leased to the plaintiff. There was a covenant for the lessees to repair party walls in both leases, but the plaintiff claimed on the ground that there was an implied covenant in the lease that the defendants would keep their premises in such condition as to enable him to perform his covenant to repair; but it was held that there was no such implied covenant, and that he could not recover (2).

There is also an implied covenant on the part of the lessee *Husbandry*. that he will manage and cultivate the lands demised in a good and husbandlike manner, according to the custom of the country (a).

If, however, there is an express covenant in the lease, such a covenant will control the implied covenant to farm according to the custom (b).

Where the covenant is not inconsistent with the custom, both may stand (c), and it is question of law for the Court whether the custom is excluded by the terms of the covenant (d).

It has been held that where there is a covenant to bring land into cultivation within five years, and also to keep it in good farming condition, the former covenant not having been performed, the latter cannot be insisted upon (e).

(2) *Colbeck v. The Girdlers' Company*, 45 L. J. Q. B. 225; L. R. 1 Q. B. D. 234. 808; *Clarke v. Roystone*, 13 M. & W. 752.

(a) *Powley v. Walker*, 5 T. R. 466; *Holding v. Pigott*, 7 Bing. 465; *Legh v. Hewitt*, 4 East. 154; *Sutton v. Temple*, 12 M. & W. 63; *Angerstein v. Hanson*, 1 C. M. & R. 789; *Earl of Falmouth v. Thomas*, 1 Cr. & M. 89; *Hallifax v. Chambers*, 4 M. & W. 662; *Martyn v. Clue*, 18 Q. B. 661, 682. (d) *Parker v. Ibbetson*, 4 C. B. N.S. 846. See *post*, Part 2, c. 3, s. 3.

(b) *Webb v. Plummer*, 2 B. & C. N.S. 632. In this case, a bill was filed for the performance of the

746; *Roberts v. Barker*, 1 Cr. & M.

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For title.

An agreement to grant a lease contains an implied undertaking on the part of the intended lessor that he has title to grant such lease; and, if he has not, he is liable to an action at the suit of the intended lessee (*f*). So also upon an agreement to sell an existing lease, the seller impliedly engages to make out the lessor's title to demise (*g*); but upon the sale of an agreement for a lease, it seems to be otherwise (*h*), for it is not a sale of an interest in the land, but only a sale of an agreement.

Quiet enjoyment.

A tenant has a right to have his estate secured to him, and he has a right to have the quiet enjoyment of it secured to him (*i*). Hence arises an implied covenant upon the part of the landlord for quiet enjoyment by the mere use of the word "demise" (*j*), and that even upon a parol demise (*k*).

The word "let" or "lease," or any other word creating an actual demise, will have the same force as the word "demise" in creating a covenant for quiet enjoyment (*l*).

The word "give" or "grant" had formerly a similar effect; but now by the 8 & 9 Vict. c. 106, s. 4, in a deed executed after the 1st of October 1845, these words will not imply a covenant, except by special Act of Parliament.

This implied covenant assures to the tenant quiet enjoyment of the demised premises during the continuance of the term, without any lawful interruption or disturbance by any person having title (*m*); but it does not extend to assure the

covenants, and an injunction applied for to restrain an assignee of the lessee from using the ground for athletic sports, &c., thirty years after the lease; and Sir G. Jessel, M.R., said, that the second covenant was not such a one as could be enforced by injunction, for if so, the Court would be constantly employed in regulating the cultivation of a great part of the country.

(*f*) *Stranks v. St. John*, L. R. 2 C. P. 376, 36 L. J. C. P. 118; *Anthony v. Brecon Market Co.*, L. R. 2 Ex. 167. As to the tenant's right to have a lease granted to him, see *post*, Part II. Div. II. c. 2.

(*g*) *Hall v. Betty*, 4 M. & G. 410; *Souter v. Drake*, 5 B. & Ad. 992; *De Medina v. Norman*, 9 M. & W. 820.

(*h*) *Kintrea v. Perston*, 1 H. & N. 357, 25 L. J. Ex. 287.

(*i*) *Smith's L. & T.* 480, 2d edit. See *post*, Part II. Div. II. c. 1.

(*j*) *Williams v. Burrell*, 1 C. B. 429; *Adams v. Gibney*, 6 Bing. 656; *Noke's case*, 4 Co. Rep. 80 b; *Fraser v. Skey*, 2 Chit. Rep. 646; *Burnet v. Lynch*, 5 B. & C. 589.

(*k*) *Bandy v. Cartwright*, 8 Exch. 613; *Messent v. Reynolds*, 3 C. B. 194.

(*l*) *Bandy v. Cartwright*, 8 Exch. 913; *Hall v. City of London Brewery Company*, 2 B. & S. 737, 31 L. J. Q. B. 257.

(*m*) *Williams v. Burrell*, *supra*; *Hayes v. Bickerstaff*, Vaugh. 118; *Lucy v. Levington*, Freem. 103, 3 Kep. 163.

tenant of quiet enjoyment, without any eviction from or by the party or parties entitled to the reversion of or in the demised premises expectant on the termination of the landlord's lease (*n*).

A mere agreement for a lease does not create an implied stipulation for quiet enjoyment during the term agreed to be granted (*o*).

An implied covenant for quiet enjoyment runs with the land, and may be sued on by the assignee of the lessee (*p*).

Where a colliery was leased, it was held that there was an implied covenant to procure land by compulsory powers, to enable the lessees to make a railway to an available market, without which the colliery would be valueless, and this implied covenant not having been performed, the parties were, as far as possible, restored to their former position before the lease (*q*). Mining leases.

Sometimes covenants are implied from the express covenants which have been entered into, although the Courts have recently shown a disposition not to imply covenants which ought to have been expressed (*r*). Other implied covenants.

8. PROVISOS AND CONDITIONS.

After the covenants by the lessee, provisos and conditions by which the estate granted may be enlarged (*s*) or defeated

(*n*) *Granger v. Collins*, 6 M. & W. 458. See *Jackson v. Cobbin*, 8 M. & W. 790.

(*o*) *Drury v. Macnamara*, 5 E. & B. 612, 25 L. J. Q. B. 5; *Brashier v. Jackson*, 6 M. & W. 549; *Coe v. Clay*, 5 Bing. 440; *Jinks v. Edwards*, 11 Exch. 775; *Parker v. Taswell*, 2 De G. & J. 559, 27 L. J. Ch. 42.

(*p*) *Williams v. Burrell*, 1 C. B. 402.

(*q*) *Acraman v. Price*, 24 L. J. N.S. 487; 19 W. R. 364.

(*r*) *Aspdin v. Austin*, 5 Q. B. 671; *Dunn v. Sayles*, Id. 685; *Doe d. Marquis of Bute v. Guest*, 15 M. & W. 160; *Pilkington v. Scott*, Id. 657; *Smith v. Mayor of Harwich*, 2 C. B. N.S. 651; *Sharp v. Waterhouse*, 7 E. & B. 816. See,

however, *Emmens v. Elderton*, 4 H. of L. Cases, 624; *Whittle v. Frankland*, 2 B. & S. 49, 31 L. J. M. C. 81.

(*s*) It is unnecessary to advert to conditions *precedent*, or those upon which an estate may come into *esse*. See *Bac. Abr. Conditions*, (1); *Shep. Touch*, 133. The question whether any provision in a contract is a condition *precedent*, depends upon the intention of the parties, as apparent on the contract, and not upon any formal arrangement of the words. See *Boone v. Eyre*, 1 H. M. 273, note (a); *Tidey v. Mollett*, 16 C. B. N.S. 298; *Notes to Pordage v. Cole*, 1 Wms. Saund. 320 a; and to *Cutter v. Powell*, 2 Smith's L. C. 5th edit. Com. Dig. Condition, (B).

CHAP. IV. are frequently inserted. A condition or proviso (*t*) is defined to be "some quality annexed to a real estate, by which it may be defeated, enlarged," or created upon an uncertain event (*u*).

No precise form of words is necessary for the purpose of creating a condition in a lease, as the construction of the clause will be governed by the apparent intention of the parties, to be collected from the instrument itself (*v*). Even if the word "condition" be used, it will be construed to mean contract or stipulation, in order to effectuate the intention of the parties (*w*).

And where words both of covenant and condition are used, both will operate (*x*). Where a power of re-entry is expressly given, or may be gathered from the words of the instrument, a condition, and not a covenant, will in general be created (*y*).

A condition may be indorsed on the instrument, or may be contained in another executed the same day (*z*).

Provisos or conditions which do not concern the thing demised, but are merely collateral, do not run with the land, so as to entitle an assignee of the reversion to sue (*a*).

Leases usually contain provisos and conditions not to assign without license, with powers of re-entry for any breach of such conditions (*b*).

(*t*) A condition is called a proviso, merely on account of the word with which it usually begins.

(*u*) Co. Litt. 201 a. See also Litt. S. S. 328, 329; Bac. Abr. Conditions, (A); Lord Cromwell's case, 2 Rep. 69 b. As to the distinction between conditions in law, *i.e.*, implied conditions, and conditions in deed, see Litt. 325, 380; Co. Litt. 214 b; Mary Fortington's case, 10 Rep. 41; Shep. Touch. 117.

(*v*) Doe d. Henniker v. Wall, 8 B. & C. 308.

(*w*) Hayne v. Cummings, 16 C. B. N.S. 421.

(*x*) Shep. Touch. 122; Co. Litt. 146; Co. Litt. 203, (B); Doe d. Henniker v. Wall, 8 B. & C., per Bailey, J., 315.

(*y*) Doe d. Wilson v. Phillips, 2 Bing. 13; Doe d. Gardner v. Ken-

nard, 12 Q. B. 244. But see Liddy v. Kennedy, L. R. 5 H. L. C. 134, 149. In Shaw v. Coffin, 14 C. B. N.S. 372, it was held that the following words in an agreement for letting did not create a condition:—"The said tenant hereby agrees that he will not underlet the said premises without the consent in writing of the landlord." And see Crawley v. Price, L. R. 10 Q. B. 302.

(*z*) Com. Dig. Condition, (A) 9; Griffin v. Stanhope, Cro. Jac. 456; Goodright d. Nicholls v. Mark, 4 M. & S. 30.

(*a*) Stevens v. Copp, L. R. 4, Ex. 20, 38 L. J. Ex. 31. See *post*, Part 4, c. 1, s. 4, Covenants Running with the Land.

(*b*) See *supra*, Covenants not to Assign, p. 86.

9. POWERS OF RE-ENTRY.

All leases should contain a proviso for re-entry, for the purpose of enforcing the payment of the rent and the performance of the covenants. Powers of re-entry.

Such provisos are construed according to the intention of the parties, to be collected from the words used (*c*). Thus where there was the following proviso, that if buildings should not be completed by a certain day, it should "be lawful for the lessor into the demised premises, or any part thereof in the name of the whole, and repossess, retain, and enjoy the same," it seems to have been held that the lessor had a right of re-entry, although the word "re-enter" had been omitted (*d*). But where the intention of the parties cannot be collected from the words used, the Court will not force a meaning into words which are insensible (*e*). Where the proviso for re-entry was to take effect upon breach of any of the covenants "thereinafter" contained, and there were none, except a covenant by the lessor for quiet enjoyment, provided the lessee performed the covenants "thereinbefore" mentioned, the Court would not reject the word "thereinafter" (*f*).

Although in general the Court will construe a proviso most strictly as against the covenantor, yet a proviso that if, after thirty days' notice, the tenant should make default in performance of any covenant, the landlord might re-enter, was held not to apply to alterations of buildings made by the tenant without leave, and contrary to the covenant, but only to acts to be performed by the tenant upon notice given (*g*).

So a proviso for re-entry if the lessee "should do, or cause to be done, any act," &c., does not apply to a mere omission, as non-repair (*h*). But a proviso for re-entry may be so framed as to apply to a negative as well as to an affirmative covenant (*i*).

- (*c*) *Doe d. Davis v. Elsam, M. & M.* 189; *Doe d. Muston v. Gladwin*, 6 Q. B. 953, 961; *Croft v. Lumley*, 5 E. & Bl. 667, 27 L. J. Q. B. 321; *Perry v. Davis*, 3 C. B. N.S. 769; *Baylis v. Le Gros*, 4 C. B. N.S. 537, 539, 552.
- (*d*) *Hunt v. Bishop*, 8 Exch. 675.
- (*e*) *Doe d. Wyndham v. Carew*, 2 Q. B. 317; but see *Doe d. Darke v. Bowditch*, 8 Q. B. 973.
- (*f*) *Doe d. Spencer v. Godwin*, 4 M. & S. 265.
- (*g*) *Doe d. Palk v. Marchetti*, 1 B. & Ad. 715.
- (*h*) *Doe d. Abdy v. Stevens*, 3 B. & Ad. 299. See *West v. Dobb*, L. R., 5 Q. B. Ex. Ch. 460; 39 L. J. Q. B. 190.
- (*i*) *Wadham v. The Postmaster-General, per Blackburn, J.*, 40 L. J. Q. B. 310, L. R. 6 Q. B. 644.

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A proviso that upon breach the lessor may re-enter upon the premises, and hold them "as if the said lease had never been made," or other similar words, does not preclude an action upon the covenants accruing before the re-entry (*j*). Where there is a proviso in a lease that, upon breach of covenant, it shall be lawful for the landlord to re-enter, the landlord may elect whether to avail himself of the proviso or not (*k*), and the lessee cannot elect to treat the lease as void (*l*). A lease contained a covenant, amongst others, that the tenant should not carry away any hay, &c., under a penalty. Then followed a clause enumerating all the other covenants except this, and providing that upon breach of "any of the covenants" the lessor might re-enter; and it was held that the words of the proviso were large enough to include the omitted covenant (*m*).

As to forfeiture, re-entry, and waiver generally, see *post*, Part 3, c. 3, ss. 1 and 2.

Void and void-
able leases.

Sometimes the clause for re-entry, instead of providing that in case of breach of covenant it shall be lawful for the lessor to re-enter, states that "the lease shall cease, determine, and become void and of no effect."

A proviso that upon non-payment of rent, &c., the lease shall become utterly void, or similar words, only means that it may be made so by some act of the lessor showing an intention to avoid the lease (*n*), and the lessee cannot elect to make the lease void (*o*).

Where a fraudulent representation is made with respect to

- (*j*) *Hartshorne v. Watson*, 4 Bing. N. C. 178, 6 Dowl. 404; *Load v. Green*, 15 M. & W. 216; *Selby v. Browne*, 7 Q. B. 620; *Davies v. Underwood*, 2 H. & N. 573; *Att.-Gen. v. Cox*, 3 H. L. Cas. 240.
- (*k*) *Reid v. Parsons*, 2 Chit. 247; *Doe d. Green v. Baker*, 8 Taunt. 241; *Rede v. Farr*, 6 M. & S. 121; *Doe d. Bryan v. Bancks*, 4 B. & A. 401; *Arnsby v. Woodward*, 6 B. & C. 519; *Doe d. Nash v. Birch*, 1 M. & W. 402; *Roberts v. Davey*, 4 B. & Ad. 664; *Jones v. Carter*, 15 M. & W. 718; *Pennington v. Cardale*, 3 H. & N. 356; *Baylis v. Le Gros*, 4 C. B. N.S. 537; *Hayne v. Cummings*, 16 C. B. N.S. 421.
- (*l*) *Rede v. Farr*, 6 M. & S. 121;
- Doe d. Bryan v. Bancks*, 4 B. & Ad. 401; *Roberts v. Davey*, 4 B. & Ad. 664; *Doe d. Nash v. Birch*, 1 M. & W. 402.
- (*m*) *Doe d. Antrobus v. Jepson*, 3 B. & Ad. 402.
- (*n*) *Hartshorne v. Watson*, 4 Bing. N. C. 178; *Davies v. Underwood*, 2 H. & N. 573; *Roberts v. Davey*, 4 B. & Ad. 664; *Pennington v. Cardale*, 3 H. & N. 656; *Hughes v. Palmer*, 19 O. B. N.S. 393; *Arnsby v. Woodward*, 6 B. & C. 519; *Baylis v. Le Gros*, 4 C. B. N.S. 537.
- (*o*) *Rede v. Farr*, 6 M. & S. 121; *Doe d. Bryan v. Bancks*, 4 B. & Ad. 401; *Roberts v. Davey*, 4 B. & Ad. 664; *Doe d. Nash v. Birch*, 1 M. & W. 402.

a collateral matter, in order to procure the granting of the lease, it will not avoid the lease (*p*); but a plea of fraud or illegality may be a good answer to an action for not granting a lease under such circumstances (*q*).

Where there is an express covenant against using a house for immoral purposes, yet if the lessor permits a breach of the covenant, and derives gain from it, he cannot afterwards recover upon his covenant (*r*).

Arrears of rent accruing before the lease is made void may be sued for; and so also with respect to breaches of other covenants, even if the lessor is to hold the premises upon re-entry "as if the lease had never been made" (*s*).

10. LEASES UNDER POWERS.

The general nature and effect of powers, and what is or is not a valid execution of a particular power, is too wide a subject to be treated of here. There are, however, certain leading cases and principles which should be stated. The subject is fully treated of in other works more particularly devoted to this branch of the law (*t*). It may, in general, be stated, that the creation of the power and its execution will be construed according to the intention of the parties, collected from the words of the instrument, according to their ordinary and common acceptance (*u*).

The Court will, if possible, support an appointment under a power, if it is not exercised from improper motives (*v*).

It is also a general principle that a man having a power

(*p*) *Feret v. Hill*, 15 C. B. 207.

(*q*) *Calvaleiro v. Puget*, 4 F. & F. 537; *Cowan v. Milburn*, L. R. 2 Ex. 230, 36 L. J. Ex. 124.

(*r*) *Smith v. White*, 35 L. J. Ch. 454. See also *Gas Light Co. v. Turner*, 5 Bing. N. C. 666, where the purpose is illegal. And see *White v. Jameson*, 22 W. R. 761.

(*s*) See *Hartshorne v. Watson*, 4 Bing. N. C. 178. And see the cases cited *ante*, p. 106, n. (*i*), as to re-entry.

(*t*) See *Sugden on Powers*, 711-835; *Woodfall, L. & T.* 153, 10th

edit.; *Chance on Powers*; *Powell on Powers*.

(*u*) *Ren d. Hall v. Bulkeley*, 1 Doug. 293; *Pomeroy v. Partington*, 3 T. R. 665; *Goodtitle d. Clarges v. Funucan*, 2 Doug. 573; *Hawkins v. Kemp*, 3 East. 441; *Doe d. Bartlett v. Rendle*, 3 M. & S. 99; *Griffith v. Harrison*, 4 T. R. 737; *Jagon v. Vivian*, L. R. 2 C. P. 422, 3 H. L. Cas. 285, 36 L. J. C. P. 145, 37 ib. 313.

(*v*) See *per Turner, L.J.*, in *Carver v. Richards*, 29 L. J. Ch. 360.

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If a tenant for life makes a lease without taking notice of a power, it shall be taken to be an execution of the power, for otherwise the lease shall not have an effectual continuance (*x*).

If a man charge his estate, and then execute his power of leasing, the lessee will take subject to the charge (*y*).

Upon a general power to make leases, the law adjudges that the leases ought to be leases in possession, and not in reversion (*z*). And if a man have a power to make leases in possession or reversion, having exercised his power in one way, he cannot afterwards exercise it in another (*a*).

Where the power makes no mention of covenants, any covenants may be inserted or omitted, provided such insertion or omission be not a fraud which may lessen the value of the reversion (*b*).

Where the power requires that the leases should be made under the "usual covenants," the question what are such is a question for the jury, and they must consider what were such at the time of the creation of the power (*c*).

By the 13 Vict. c. 17, s. 2, where, upon or before the acceptance of rent under any such invalid lease, any receipt, memorandum, or note in writing, confirming such lease, is signed by the person accepting such rent, or some other person by him thereunto lawfully authorised, such acceptance shall, as against the person so accepting such rent, be deemed a confirmation of such lease, and see 12 & 13 Vict. c. 26, *infra*.

These Acts do not apply to leases granted by a mere stranger to the leasing power (*d*).

- (*w*) *Isherwood v. Oldknow*, 3 M. & S. 382; *Kaston v. Pratt*, 2 H. & C. 676, 33 L. J. Ex. 233; *Edwards v. Milbank*, 4 Drew, 606, 29 L. J. Ch. 45; *Sug. Pow.* 746, pl. 26.
 (*x*) 1 Vent. 228.
 (*y*) *Sabbarton v. Sabbarton*, Cas. Temp. Hardw. 415.
 (*z*) *Sheecomb v. Hawkins*, Cro. Jac. 318, Yelv. 222.
 (*a*) *Winter v. Loveday*, 1 Ld. Raym. 267.
 (*b*) *Goodtitle d. Clarges v. Funucan*, 2 Doug. 575.
 (*c*) *Goodtitle v. Funucan*, 2 Doug. 565; *Doe d. Earl of Egremont v. Stephens*, 6 Q. B. 288; *Smith v. Doe d. Earl of Jersey*, 7 Price, 281, 2 B. & B. 473; *Doe d. Earl of Egremont v. Williams*, 11 Q. B. 688.
 (*d*) *Ex parte Cooper in re the North London Railway Co.*, 34 L. J. Ch. 373. See also *Robson v. Flight*, 34 L. J. Ch. 226.

With respect to the mode of executing a lease under a power, it is provided by the 22 & 23 Vict. c. 35, s. 12, that such a lease may now be executed and attested in the manner in which deeds are ordinarily executed and attested, notwithstanding any express provision in the power to the contrary. But if the consent of any particular person be required by the power, such consent is necessary to a valid execution (e); or if any act is required to be performed, it must be performed (f). The statute does not make invalid the execution of the deed according to the terms of the power (g).

Defects in leases under powers are in many cases now cured by the 12 & 13 Vict. c. 26, and the 13 Vict. c. 17.

By the 12 & 13 Vict. c. 26, s. 2, it is enacted, that where in the intended exercise of any such power of leasing as aforesaid, whether derived under an Act of Parliament, or under any instrument lawfully creating such power, a lease has been, or shall hereafter be, granted, which is, by reason of the non-observance or omission of some condition or restriction, or by reason of any other deviation from the terms of such power, invalid as against the person entitled, after the determination of the interest of the person granting such lease, to the reversion, or against other the person who, subject to any lease lawfully granted under such power, would have been entitled to the hereditaments comprised in such lease, such lease, in case the same have been made *bona fide*, and the lessee named therein, his heirs, executors, administrators, or assigns (as the case may require), have entered thereunder, shall be considered in equity as a contract for a grant at the request of the lessee, his heirs, executors, administrators, or assigns (as the case may require), of a valid lease under such power, to the like purport and effect as such invalid lease as aforesaid, save so far as any variation may be necessary in order to comply with the terms of such power; and all persons who would have been bound by a lease lawfully granted under such power shall be bound in equity by such contract: Provided always that no lessee under any such invalid lease as aforesaid, his heirs, executors, administrators, or assigns, shall be entitled by virtue of any such equitable contract, as aforesaid, to obtain any variation of such lease, where the persons who would have been bound by such contract are willing to confirm such lease without variation.

(e) *Freshfield v. Reed*, 9 M. & W. 404. (g) See the proviso, 22 & 23 Vict. c. 35, s. 12.

(f) *Fryer v. Coombes*, 11 A. & E. 403.

CHAP. IV. Sect. 3 of the Act is repealed by the 13 Vict. c. 17, *infra*.

By sect. 4, where a lease granted in the intended exercise of any such power of leasing as aforesaid is invalid by reason that, at the time of the granting thereof, the person granting the same could not lawfully grant such lease, but the estate of such person in the hereditaments comprised in such lease shall have continued after the time when such or the like lease might have been granted by him, in the lawful exercise of such power, then, and in every such case, such lease shall take effect, and be as valid as if the same had been granted at such last-mentioned time, and all the provisions herein contained shall apply to every such lease.

By sect. 5, when a valid power of leasing is vested in, or may be exercised by, a person granting a lease, and such lease, by reason of the determination of the estate or interest of such person, or otherwise, cannot have effect and continuance according to the terms thereof, independently of such power, such lease shall, for the purposes of this Act, be deemed to be granted in the intended exercise of such power, although such power be not referred to in the lease.

By sect. 6, the rights of lessees under covenants for title and quiet enjoyment, and the lessor's right of re-entry, and other rights for breach of covenant, are saved.

By sect. 7, the Act does not extend to ecclesiastical, college, hospital, or charitable leases, or where a lease has been surrendered, &c., by reason of its invalidity.

By the 13 Vict. c. 17, s. 2, it is enacted, that where, upon or before the acceptance of rent under any such invalid lease, as in the said first-recited Act mentioned, any receipt, memorandum, or note in writing, confirming such lease, is signed by the person accepting such rent, or some other person by him thereunto lawfully authorised, such acceptance shall, as against the person so accepting such rent, be deemed a confirmation of such lease.

By sect. 3, where, during the continuance of the possession taken under any such invalid lease, as in the said first-recited Act mentioned, the person for the time being entitled (subject to such possession as aforesaid) to the hereditaments com-

prised in such lease, or to the possession, or the receipt of the rents and profits thereof, is able to confirm such lease without variation, the lessee, his heirs, executors, or administrators (as the case may require), or any person who would have been bound by the lease, if the same had been valid, shall, upon the request of the person so able to confirm the same, be bound to accept a confirmation accordingly; and such confirmation may be by memorandum, or note in writing, signed by the persons confirming and accepting respectively, or by some other persons by them respectively thereunto lawfully authorised; and after confirmation and acceptance of confirmation, such lease shall be valid, and shall be deemed to have had from the granting thereof the same effect as if the same had been originally valid.

II. LEASES BY ESTOPPEL

The creation of a lease by estoppel is of a singular character, and is therefore reserved for a separate section. It arises from the general doctrine of estoppel that a man is not permitted to allege or prove anything in contradiction or contravention of his own deed (*h*). Thus a lessor is estopped by the lease which he has made from denying his competency to make it, and the tenant, upon the other hand, is estopped from disputing his lessor's title, and hence the relation of landlord and tenant is created between them by law (*i*). "And if one makes a lease for years by indenture of lands wherein he hath nothing at the time of such lease made, and after purchases those very lands, this shall make good and unavoidable his lease, as well as if he had been in the actual possession and seisin thereof at the time of such lease made; because he having by indenture expressly demised those lands, is, by his own act, estopped and concluded to say he did not demise them, then there is nothing to take off or impeach the validity of the indenture, which expressly affirms that he did demise them; and consequently the lessee may take advantage thereof whenever the lessor comes to such an estate in those lands as is capable to sustain and support that lease" (*j*). And when the estoppel becomes good in point of interest—that is, when the lessor acquires the land

(*h*) *Lyon v. Reed*, 13 M. & W. 285. which does not give him power to

(*i*) *Darlington v. Pritchard*, 4 M. & G. 783; *Green v. James*, 6 M. & W. 656. But if the lessor is trustee for the public under a public Act act, he will not be estopped. *Fair-title v. Gilbert*, 2 T. R. 169.

(*j*) *Bac. Abr. tit. Lease*, (O).

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by purchase or otherwise—the heir of the lessor, and persons claiming by assignment from the lessor, are bound by the estoppel (*k*). The law of estoppel also creates a reversion in fee-simple by estoppel in the lessor, which passes by descent to his heir, and by purchase to his assignee or devisee (*l*). But if, upon the face of the lease, the real title or want of title of the lessor appears, or any interest passes, there will be no estoppel (*m*).

So also the tenant, so long as he retains possession, is estopped from denying his lessor's title (*n*); but in an action against him by the landlord, the tenant may show that the landlord's title has expired (*o*). So, if he is actually evicted by the title paramount of a third party, such eviction is pleadable in bar to a demand of rent by the lessor (*p*).

An under-lease made by a lessee who had no legal interest operates as an estoppel (*q*).

As to the effect of recitals in a lease in creating an estoppel, see *ante*, Recitals.

12. STAMPS.

The *ad valorem* stamp duty on a lease is to be regulated by the consideration appearing on the face of it, although it may not be that which is actually paid (*r*). A lease containing several demises at distinct rents must be stamped according to the aggregate of the stamps required for the several demises (*s*).

(*k*) *Trevivan v. Lawrence*, 1 Salk. 144, 30 ib. 42; *Wood v. Day*, 7 276; *Goodtitle v. Morse*, 3 T. R. Taunt. 646; *Beckett v. Bradley*, 7 371; *Doe d. Downe v. Thomson*, 9 M. & G. 994; *Delaney v. Fox*, 1 C. Q. B. 1043. B. N.S. 166.

(*l*) *Cuthbertson v. Irving*, 4 H. & N. 758, 28 L. J. Ex. 306, 29 ib. 485.

(*m*) *Cuthbertson v. Irving*, *supra*; *Pargater v. Harris*, 7 Q. B. 708; *Greenaway v. Hart*, 14 C. B. 340; but see *Morton v. Woods*, L. R. 3 Q. B. 658, ib. 4 Q. B. 293, 37 L. J. Q. B. 242.

Where it was the manifest intention of the parties, as expressed by the deed, that the relation of landlord and tenant should exist. See also *Jolly v. Arbuthnot*, 4 De G. & J. 224, 28 L. J. Ch. 547.

(*n*) *Cuthbertson v. Irving*, *supra*; *Dolby v. Isles*, 11 Ad. & E. 335; *Phipps v. Sculthorpe*, 1 B. & Ad. 50; *Levy v. Lewis*, 28 L. J. C. P.

144, 30 ib. 42; *Wood v. Day*, 7 276; *Goodtitle v. Morse*, 3 T. R. Taunt. 646; *Beckett v. Bradley*, 7 M. & G. 994; *Delaney v. Fox*, 1 C. B. N.S. 166.

(*o*) *Claridge v. Mackenzie*, 4 M. & G. 143; *Doe d. Leeming v. Skirrow*, 7 A. & E. 157; *Downes v. Cooper*, 2 Q. B. 263; *Neave v. Moss*, 1 Bing. 363; *Doe d. Jackson v. Ramsbottom*, 3 M. & S. 516.

(*p*) *Delaney v. Fox*, 2 C. B. N.S. 768.

(*q*) *Doe d. Prior v. Ongley*, 10 C. B. 25.

(*r*) *Duck v. Braddyll*, M'Clel. 217; 13 Price 455; and see 33 & 34 Vict. c. 97, s. 97, pl. 2 *post*, p. 117.

(*s*) *Boase v. Jackson*, 3 B. & B. 185; *Blount v. Pearman*, 1 Bing. N. C. 408; *Parry v. Deere*, 5 A. & E. 551.

It was held that if a lease contained a contract for the purchase of goods, it could not be given in evidence to prove the sale of the goods unless it had a lease stamp, although it might have had an agreement stamp (*t*). Now, by the 33 & 34 Vict. c. 97, s. 97, pl. 1, where part of the consideration consists of goods, &c., the value of the goods is to be deemed a consideration in respect of which the lease is chargeable with *ad valorem* duty (*u*).

A lease containing a right of purchasing the premises for a certain sum only requires a single lease stamp (*v*).

If a stamped lease be altered by a new document, that will require a stamp (*w*), unless the alterations are merely an expression of what was before intended (*x*).

Where a document is a mere proposal for a lease which is subsequently agreed to by parol, it does not require a stamp (*y*); but where it is itself a concluded agreement, although unexecuted, it is otherwise (*z*).

Where the terms are agreed upon by parol, and only recognised by a subsequent instrument, it need not be stamped (*a*).

Where an unstamped agreement was incorporated in a subsequent stamped agreement, it was held the two constituted a perfect lease, and might be both given in evidence (*b*).

Though an oral lease for three years may be good, yet if it is reduced into writing it must be stamped (*c*).

It is proposed, in dealing with the present subject, only to refer to those general provisions of the latest Stamp Act which seem most material to the present work, and also to those special provisions which relate to stamps on leases and other matters bearing on the relations between landlord and tenant.

(*t*) *Corder v. Drakeford*, 3 Taunt. 382; *Clayton v. Burtenshaw*, 5 B. & C. 41; *Stone v. Rogers*, 2 M. & W. 443.

(*u*) See the sect. *post*, p. 116.

(*v*) *Worthington v. Warrington*, 5 C. B. 636.

(*w*) *Reed v. Deere*, 7 B. & C. 261.

(*x*) *Doe d. Waters v. Houghton*, 1 Man. & R. 208.

(*y*) *Draut v. Browne*, 3 B. & C. 665.

(*z*) *Chadwick v. Clarke*, 1 C. B. 700; *Turner v. Power*, 7 B. & C. 625.

(*a*) *Bethell v. Blencowe*, 3 M. & G. 119. See *Marshall v. Powell*, 9 Q. B. 779.

(*b*) *Pearce v. Cheslyn*, 4 A. & E. 225.

(*c*) *Prosser v. Phillips*, Bull. N. P. 269.

CHAP. IV.
The Stamp Act,
1870, 33 & 34
Vict. c. 97-99.

"The Stamp Act, 1870," which came into operation on 1st January 1871, enacts, by sect. 3, that "from and after the commencement of this Act, and subject to the exemptions contained in the schedule to this Act, and in any other Acts for the time being in force, there shall be charged for the use of Her Majesty, her heirs and successors, upon the several instruments specified in the schedule to this Act, the several duties in the said schedule specified, and no other duties." This in effect repeals all progressive duty which is not mentioned in the Act or in the schedule thereto.

Sect. 7 provides that instruments written upon stamped paper, or subsequently stamped, are to be so stamped as to make the stamp appear upon the face of the instrument, and so as it cannot be used for any other instrument. Where there are more than one instrument on one paper, each must be stamped.

Sect. 8 provides that, except where it is provided to the contrary, an instrument containing separate matters is to be separately charged, and where it is made for considerations for which it is chargeable with *ad valorem* duty, and also for a further consideration, it is to be charged for such further consideration separately (*d*).

By sect. 9, instruments are to be stamped with the stamps which are appropriated to them by words on the face of the stamp.

By sect. 10, the facts affecting the amount of the stamp, &c., are to be set forth in the instrument, under certain penalties.

By sect. 15—(1.) "Except where express provision to the contrary is made by this or any other Act, any unstamped or insufficiently stamped instrument may be stamped after the execution thereof, on payment of the unpaid duty, and a penalty of £10; and also by way of further penalty, where the unpaid duty exceeds £10 of interest on such duty, at the rate of £5 per centum per annum, from the day upon which the instrument was first executed, up to the time when such interest is equal in amount to the unpaid duty. And the payment of any penalty or penalties is to be denoted on the instrument by a particular stamp. (2.) Provided as follows:

(*d*) See, however, sect. 98, pl. 2, *post*, p. 117.

—(a) Any unstamped or insufficiently stamped instrument, which has been first executed at any place out of the United Kingdom, may be stamped at any time within two months after it has been first received in the United Kingdom, on payment of the unpaid duty only. (b) The Commissioners may, if they think fit, at any time within twelve months after the first execution of any instrument, remit the penalty or penalties of any part thereof."

By sect. 16—(1.) "Upon the production of an instrument chargeable with any duty as evidence in any Court of civil judicature, in any part of the United Kingdom, the officer whose duty it is to read the instrument shall call the attention of the judge to any omission or insufficiency of the stamp thereon; and if the instrument is one which may legally be stamped after the execution thereof, it may, on payment to the officer of the amount of the unpaid duty, and the penalty payable by law on stamping the same as aforesaid, and of a further sum of £1, be received in evidence, saving all just exceptions on other grounds. (2.) The officer receiving the said duty and penalty shall give a receipt for the same, and make an entry in a book kept for that purpose of the payment of the amount thereof, and shall communicate to the Commissioners the name or title of the cause or proceeding in which, and of the party from whom, he received the said duty and penalty, and the date and description of the instrument, and shall pay over to the Receiver-General of inland revenue, or to such other person as the Commissioners may appoint, the money received by him for the said duty and penalty. (3.) Upon production to the Commissioners of any instrument in respect of which any duty or penalty has been paid as aforesaid, together with the receipt of the said officer, the payment of such duty and penalty shall be denoted on such instrument accordingly."

By sect. 17, "Save and except as aforesaid, no instrument executed in any part of the United Kingdom, or relating, wheresoever executed, to any property situate, or to any matter or thing done, or to be done, in any part of the United Kingdom, shall, except in criminal proceedings, be pleaded or given in evidence, or admitted to be good, useful, or available in law or equity, unless it is duly stamped in accordance with the law in force at the time when it was first executed."

Sects. 18-20 relate to proceedings for getting instruments

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stamped by Commissioners, after which they become admissible in evidence, notwithstanding any objection relating to duty.

By sect. 23, except where express provision is made to the contrary, all duties are to be denoted by impressed stamps only.

Sect. 24 relates to the proper mode of cancelling an adhesive stamp by writing the name and date across it, without which it will not be deemed duly stamped, unless it is otherwise proved that the stamp was affixed at the proper time.

The most material of the special regulations of the statute are as follows :—

AS TO DUPLICATES AND COUNTERPARTS.

By sect. 93, the duplicate or counterpart of an instrument chargeable with duty (except the counterpart of an instrument chargeable as a lease, such counterpart not being executed by or on behalf of any lessor or grantor), is not to be deemed duly stamped, unless it is stamped as an original instrument, or unless it appears by some stamp impressed thereon that the full and proper duty has been paid upon the original instrument, of which it is the duplicate or counterpart.

AS TO LEASES, ETC.

By sect. 96—(1.) An agreement for a lease or tack, or with respect to the letting of any lands, tenements, or heritable subjects, for any term not exceeding thirty-five years, is to be charged with the same duty as if it were an actual lease or tack made for the term and consideration mentioned in the agreement. (2.) A lease or tack made subsequently to, and in conformity with, such an agreement, duly stamped, is to be charged with the duty of sixpence only.

By sect. 97—(1.) Where the consideration, or any part of the consideration, for which any lease or tack is granted or agreed to be granted, does not consist of money, but consists of any produce or other goods, the value of such produce or goods is to be deemed a consideration in respect of which the lease or tack or agreement is chargeable with *ad valorem* duty, and where it is stipulated that the value of such produce or goods is to amount at least to, or is not to exceed, a

given sum ; or where the lessee is specially charged with, or has the option of paying after, any permanent rate of conversion, the value of such produce or goods is, for the purpose of assessing the *ad valorem* duty, to be estimated at such given sum, or according to such permanent rate. (2.) A lease or tack or agreement, made either entirely or partially for any such consideration, if it contains a statement of the value of such consideration, and is stamped in accordance with such statement, is, so far as regards the subject-matter of such statement, to be deemed duly stamped, unless or until it is otherwise shown that such statement is incorrect, and that it is in fact not duly stamped.

By sect. 98—(1.) A lease or tack or agreement for a lease or tack, or with respect to any letting, is not to be charged with any duty in respect of any penal rent, or increased rent in the nature of a penal rent, thereby reserved or agreed to be reserved or made payable, or by reason of being made in consideration of the surrender or abandonment of any existing lease, tack, or agreement of, or relating to, the same subject-matter. (2.) No lease made for any consideration or considerations in respect whereof it is chargeable with *ad valorem* duty, and in further consideration either of a covenant by the lessee to make, or of his having previously made, any substantial improvement of or addition to the property demised to him, or of any covenant relating to the matter of the lease, is to be charged with any (e) duty in respect of such further consideration. (3.) No lease for a life or lives not exceeding three, or for a term of years determinable with a life or lives not exceeding three, and no lease for a term absolute, not exceeding twenty-one years, granted by an ecclesiastical corporation, aggregate or sole, is to be charged with any higher duty than 35s. (4.) No lease for a definite term exceeding thirty-five years, granted under the "Trinity College (Dublin) Leasing and Perpetuity Act, 1851," is to be charged with any higher duty than would have been chargeable thereon if it had been a lease for a definite term, not exceeding thirty-five years. (5.) No lease or tack, or agreement for a lease or tack in Scotland, of any dwelling-house or tenement, or part of a dwelling-house or tenement, for any definite term not exceeding a year, at a rent not exceeding the rate of £10 per annum, is to be charged with any higher duty than one penny.

(e) This is a re-enactment of the *sion In re Bolton's lease*, L. R. 33 & 34 Vict. c. 44, s. 1, which was 5 Ex. 82; 39 L. J. Ex. 51, and see passed in consequence of the deci- the 39 Vict. c. 16, s. 11, *infra*.

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By sect. 99, the duty upon an instrument chargeable with duty as a lease or tack for any definite term less than a year of—(1.) any dwelling-house or tenement, or part of a dwelling-house or tenement, at a rent not exceeding the rate of £10 per annum; (2.) any furnished dwelling-house or apartments; or upon the duplicate or counterpart of any such instrument, may be denoted by an adhesive stamp, which is to be cancelled by the person by whom the instrument is first executed.

By sect. 100—(1.) Every person who executes or prepares, or is employed in preparing, any instrument upon which the duty may, under the provisions of the last preceding section, be denoted by an adhesive stamp, and which is not, at or before the execution thereof, duly stamped, shall forfeit the sum of £5. (2.) Provided that nothing in this section contained shall render any person liable to the said penalty of £5 in respect of any letters or correspondence.

By the 39 Vict. c. 16, s. 11, an instrument, whereby the rent reserved by any other instrument chargeable with stamp-duty as a lease or tack, and duly stamped accordingly, is increased, shall not be chargeable with stamp-duty otherwise than as a lease or tack in consideration of the additional rent thereby made payable.

Schedule of
stamp duties.

By the schedule to the Stamp Act, the following (amongst other) stamp-duties are imposed, viz. :—

Agreement for a lease, or tack, or for any letting. See Lease. Agreement, or any memorandum of an agreement, made in England or Ireland under hand only, or made in Scotland without any clause of registration, and not otherwise specifically charged with any duty, whether the same be only evidence of a contract, or obligatory upon the parties from its being a written instrument, £0 0 6

Exemptions.

(1.) Agreement or memorandum the matter whereof is not of the value of £5.

(2.) Agreement or memorandum for the hire of any labourer, artificer, manufacturer, or menial servant.

(3.) Agreement, letter, or memorandum made for or relating to the sale of any goods, wares, or merchandise.

(4.) [Not copied.] And see sect. 36.

Covenant. Any separate deed of covenant (not being an instrument chargeable with *ad valorem* duty, as a conveyance on sale or mortgage) made on

the sale or mortgage of any property, and relating solely to the conveyance or enjoyment of, or the title to, the property sold or mortgaged, or to the production of the muniments of title relating thereto, or to all or any of the matters aforesaid—

Where the *ad valorem* duty in respect of the consideration or mortgage money does not exceed 10s.,

{ A duty equal to the amount of such *ad valorem* duty.

In any other case, £0 10 0
Deed of any kind whatsoever not described in this schedule, 0 10 0

And see sect. 4.

Duplicate or counterpart of any instrument chargeable with any duty—

Where such duty does not amount to 5s., . . . { The same duty as the original instrument.
In any other case, 0 5 0

And see sect. 93.

Lease or tack—

(1.) For any definite term less than a year—

- (a) Of any dwelling-house or tenement, or part of a dwelling-house or tenement, at a rent not exceeding £10 per annum, 0 0 1
(b) Of any furnished dwelling-house or apartments where the rent for such term exceeds £25, 0 2 6

- (c) Of any lands, tenements, or heritable subjects, except or otherwise than as aforesaid, { The same duty as a lease for a year at the rent reserved for the definite term.
(2.) For any other definite term, or for any indefinite term ;

Of any lands, tenements, or heritable subjects—

Where the consideration, or any part of the consideration, moving either to the lessor, or to any other person, consists of any money, stock, or security—

In respect of such consideration, . . . { The same duty as a conveyance on a sale for the same consideration.

Where the consideration, or any part of the consideration, is any rent—

In respect of such consideration ;

If the rent, whether reserved as a yearly rent or otherwise, is at a rate or average rate :—

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	If the term is definite, and does not exceed 35 years, or is indefinite.	If the term, being defi- nite, exceeds 35 years, but does not ex- ceed 100 yrs.	If the term, being defi- nite, exceeds 100 years.
	£ s. d.	£ s. d.	£ s. d.
Not exceeding £5 per annum.	0 0 6	0 3 0	0 6 0
Exceeding £5, and not exceeding £10,	0 1 0	0 6 0	0 12 0
" 10, " " " 15,	0 1 6	0 9 0	0 18 0
" 15, " " " 20,	0 2 0	0 12 0	1 4 0
" 20, " " " 25,	0 2 6	0 15 0	1 10 0
" 25, " " " 50,	0 5 0	1 10 0	3 0 0
" 50, " " " 75,	0 7 6	2 5 0	4 10 0
" 75, " " " 100,	0 10 0	3 0 0	6 0 0
" 100,			
For every full sum of £50, and also for any fractional part of £50 thereof, }	0 5 0	1 10 0	3 0 0
Of any other kind whatsoever not hereinbefore described, . . . }	0 10 0

And see sects. 96-100.

Schedule, inventory, or document of any kind whatsoever referred to, in, or by, and intended to be used, or given in evidence as part of, or as material to, any other instrument charged with any duty, but which is separate and distinct from, and not indorsed on or annexed to, such other instrument—

Where such other instrument is chargeable {The same duty
with any duty not exceeding 10s., as such other
instrument.
In any other case, £0 10 0

Exemptions.

- (1.) [Not copied.]
- (2.) Any public map, plan, survey, apportionment, allotment, award, and other parochial or public document and writing, made under or in pursuance of any Act of Parliament, and deposited or kept for reference in any registry, or in any public office, or with the public books, papers, or writings of any parish.

Surrender—

Of copyholds. See Copyhold.

Of any other kind whatsoever, not chargeable with duty as conveyance on sale or mortgage, . . . 0 10 0

13. COUNTERPARTS.

Formerly leases were made by indentures, but since the 8 & 9 Vict. c. 106, s. 5, deeds need not be actually indented.

The part executed by the grantor was the original, and the parts executed by other parties were counterparts (*f*). The lease is that which is executed by the lessor, and the counterpart is that which is executed by the lessee. The admissibility in evidence of the counterpart is not affected by the want of stamp upon the original (*g*). A counterpart is primary evidence of the contents of the lease (*h*), and of the execution thereof by the lessor (*i*). Under the Settled Estates Act, the execution of a lease is sufficient evidence that a counterpart has been duly executed by the lessee (*j*).

In the absence of any express stipulation, the lessee pays for the cost of the lease, and the lessor for the cost of the counterpart (*k*).

- (*f*) If the two parts are executed by both parties, they are duplicates. 363. *Houghton v. Koenig*, 18 C. B. 235. *Hughes v. Clark*, 10 C. B. 905.
 (*g*) As to the stamping of counterparts, see *ante*, pp. 116, 119. (*g*) 19 & 20 Vict. c. 120, s. 34.
 (*h*) *Paul v. Meek*, 2 Y. & J. 116. (*k*) *Jennings v. Major*, 8 C. & P. 61.
 (*i*) *Roe d. West v. Davis*, 7 East.

PART II.

CONTINUATION OF TENANCY.

DUTIES OF THE PARTIES.

BESIDES those duties which are imposed by the particular covenants contained in the contract between the parties, there are very important duties which, however they may be varied by arrangement, arise out of the relation between the parties, and which have now to be considered.

DIVISION I.—DUTIES OF THE TENANTS.

CHAPTER I.

DUTY TO PAY RENT.

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The principal duty of the tenant is the payment of his rent. The nature of rent and express covenants to pay rent have been considered *ante*, pp. 74, 79.

1. TIME WHEN PAYABLE.

Time of pay-
ment.

With respect to the certainty of the time when rent is to be paid, where the reservation is half-yearly or quarterly, but no specific days are mentioned, the time of payment must be computed by the habendum; and in a case in which rent was payable by a parol demise "from Ladyday following,"

evidence of the custom of the country was admitted to show that by "Ladyday," Old Ladyday was intended (*a*). If the reservation be general, and no mention be made of half-yearly or quarterly payments, nothing is due till the end of the year (*b*); and where a reservation was general in the written agreement of demise, but the landlord afterwards asked the tenant how he would like to pay the rent, and the tenant replied quarterly, it was held that the rent was still due annually, and not quarterly, although rent had been actually paid quarterly (*c*). Where rent is payable quarterly, it will be intended to be payable by equal portions (*d*), and will be due on the first of the days mentioned in order of time, without regard to the arrangement of the words (*e*). Where the reservation was "quarterly or half-quarterly, if desired," it was held that the landlord, having received the rent quarterly for the first twelve months, could not distrain for a half-quarter's rent without notice (*f*).

An agreement was entered into on the 31st of January, by which the tenant agreed to become tenant at the customary time of entry (which was the 12th of May), and to pay the annual rent at the usual time (which was Michaelmas), as agreed upon; and it was held that this did not necessarily mean that the rent should be payable at the end of the year from the time of entry, but at the customary time of Michaelmas (*g*).

Sometimes rent is reserved payable in advance. When this is the case, it should be clearly expressed whether the payment in advance is intended to refer to the current quarter at the time of the reservation, or to each successive quarter during the term (*h*). A rent may also be reserved to commence before the lessee is to enter on all the land demised, as where there is a lease to commence *in futuro* of Blackacre, and *in presenti* of Whiteacre, rendering rent payable before the commencement of the term in Blackacre. Here the rent,

(*a*) Doe *d.* Hall *v.* Benson, 4 B. & A. 588.

(*b*) Cole *v.* Sury, Latch. 264. See also Comber *v.* Howard, 1 C. B. 440; Turner *v.* Allday, Tyr. & Gr. 819; Collett *v.* Curling, 10 Q. B. 785.

(*c*) Turner *v.* Allday, Tyr. & Gr. 819; Comber *v.* Howard, 1 M. & Gr. 440.

(*d*) Com. Dig. Rent, (B) 8; Hutchins *v.* Scott, 2 M. & W. 809.

(*e*) Hill *v.* Grange, Plowd. 171.

(*f*) Mallam *v.* Arden, 10 Bing. 299.

(*g*) Gore *v.* Lloyd, 12 M. & W. 463.

(*h*) Holland *v.* Palser, 2 Stark, 161; Hopkins *v.* Helmore, 8 A. & E. 463. See M'Leish *v.* Tate, Cowp. 781.

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being an entire thing, is payable according to the reservation (i).

Rent reserved upon a lease is not payable until the midnight of the day specified in the lease for payment of it (j). Though where, in order to create a forfeiture, it is necessary to make a *demand*, the demand must be made before sunset (k).

Where the terms of the reservation were, "The yearly rent to be £110, and the rent shall be payable in advance if the landlord require the same," and no days of payment were specified, but at the end of the quarter the landlord demanded the quarter's rent, and, upon non-payment, distrained for the whole yearly rent, it was ruled that he was only entitled to distrain for the quarter's rent (l).

Where the tenant was to pay the last half-year's rent in advance, which was to be considered as reserved and due on a certain day preceding, if the landlord should see cause for such a demand, it was held that he might demand the rent and distrain for it between the day named and the expiration of the tenancy, without demand previous to the day named (m).

If the tenant pay his rent before it is due, it is voluntary and not satisfactory (n). The statute of Anne, which does away with attornment (o), protects the tenant from any claim by an assignee of the reversion where no notice has been given; but where the tenant paid rent to his landlord before it was due, and before it was due received notice from the assignee, it was held that the tenant was still liable to the assignee for the rent (p).

2. MODE OF PAYMENT.

Rent is to be paid on the land (q), except in the case of a

- (i) Gilb. on Rents, 25.
- (j) Cutting v. Derby, 2 Wm. Bl. 1077; Leftley v. Mills, 4 T. R. 170.
- (k) Duppa v. Mayo, 1 Wm. Saund. 287; Tinckler v. Prentice, 4 Taunt. 549; Clun's case, 10 Co. 127. See also Com. Dig. Pleader (2 W. 49), Maund's case, 7 Co. R. 28 b; Fabian's case, 1 Leon. 305; Wood & Chiver's case, 4 Leon. 179; Acocks v. Phillips, 5 H. & N. 183; Collier v. Nokes, 2 C. & K. 1012. See also *post*, Part 3, c. 3, s. 1, pp. 257, 258.
- (l) Clarke v. Holford, 2 C. & K. 540.
- (m) Witty v. Williams, 12 W. R. 755, 10 L. T. N.S. 457, Q. B.
- (n) Clun's case, *supra*.
- (o) See Attornment, Part 4, a. 1, s. 1.
- (p) *Re Nichols*, L. R. 5 C. P. 589, 39 L. J. C. P. 296.
- (q) Rowe v. Young, 2 B. & B. 234; Crouch v. Fastolfe, Sir T. Raymond, 418, Com. Dig. Pleader, (2 W. 49).

covenant to pay rent, for then the covenantor must pay or tender the money to the covenantee, according to his covenant (r).

It is said that, like any other species of debt, rent may be paid by a remittance through the post (s).

A demand for rent is even higher than a demand upon a bond or other specialty, although in case of death it ranks against the executor with specialty debts (t). So when the landlord takes a bond, bill, or note, this will not bar him of his remedies for rent (u).

Receipts for rent, like any other receipt, require a penny stamp if the sum amounts to £2 and upwards (v).

3. DEDUCTIONS.

Although no set-off or claim for damages sustained by the lessee can be set off against a claim for rent due to the lessor, unless by some express agreement (w), yet there are several payments in the nature of cross demands which the lessee is entitled to have deducted from the amount of the rent, and to have considered as payment *pro tanto*. The general rule, however, is that the lessee can treat as a discharge of the rent only those payments to third parties which are made in satisfaction of a charge on the land or of a debt of the lessor (x). In *Graham v. Allsopp* (y), Rolfe, B., in giving the judgment of the Court, said, "The principle upon which these cases rest is this—the immediate landlord is bound to protect his tenant from all paramount claims; and when, therefore, the tenant is compelled, in order to protect himself in the enjoyment of the land in respect of which his rent is payable, to make payments which ought, as between himself and his landlord, to have been made by the latter, he is con-

(r) *Haldane v. Johnson*, 8 Exch. 689.

(s) See *Woodfall*, L. & T. 9th edit. 359; *Smith*, L. & T. 2d edit. 168.

(t) *Thompson v. Thompson*, 9 Price, 471; *Buller's N. P.* 182. The distinction between specialty and simple contract debts is abolished in case of death by the 32 & 33 Vict. c. 46; but this would probably not affect a demand for rent.

(u) *Davis v. Gyde*, 2 A. & E. 624; *Worthington v. Wigley*, 3 Bing. N. C. 454; *Murray v. King*, 5 B.

& A. 165; *Parrott v. Anderson*, 7 Exch. 93; *Drake v. Mitchell*, 3 East. 251.

(v) See the 33 & 34 Vict. c. 97, s. 120, and schedule "Receipt."

(w) See now, however, the Agricultural Holdings Act, 1875; and Order xix., Rule 3, of the Judicature Act, 1875.

(x) *Taylor v. Zamira*, 6 Taunt. 524; *Sapsford v. Fletcher*, 4 T. R. 511; *Johnson v. Jones*, 9 A. & E. 809; *Carter v. Carter*, 5 Bing. 406; *Boodle v. Campbell*, 7 M. & G. 386. (y) 3 Exch. 186-198.

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sidered as having been authorised by the landlord so to apply his rent due or accruing due. All such payments, if incapable of being treated as actual payment of rent, would certainly give the tenant a right of action against his landlord as for money paid to his use, and so would, in an action of debt for the rent, form a legitimate subject of set-off. And though in a replevin a general set-off cannot be pleaded, yet the Courts have given to the tenant the benefit of a set-off as to payments of this description, by holding them to be in fact payments of the rent itself or of part of it."

The ground upon which the landlord is presumed to authorise these payments is that he impliedly undertakes to protect the tenant against claims in respect of them (*y*). But a mere claim by a mortgagee to the rent is not sufficient to raise a presumption of an authority from the lessor to pay the rent (*z*).

Land-tax.

By the 38 Geo. III. c. 5, s. 17, it is enacted, "That the several and respective tenant or tenants of all houses, &c., which shall be rated by virtue of this Act, are hereby required and authorised to pay such sum or sums of money as shall be rated upon such houses, &c., and to deduct out of the rent so much of the said rate as, in respect of the said rents of any such houses, &c., the landlord should and ought to pay and bear; and the said landlords, both mediate and immediate, according to their respective interests, are hereby required to allow such deductions and payments upon the receipt of the residue of the rents."

By sect. 18, "Every tenant paying the said assessment or assessments last mentioned shall be acquitted and discharged of so much money as the said assessment or assessments shall amount unto, as if the same had actually been paid unto such person or persons to whom his rent shall have been due and payable;" with power to the Commissioners of land-tax, or any two of them, to settle, as they shall think fit, any differences between landlord and tenant, or any other, concerning the said rates. When they have decided any such difference, the Court of Chancery will not re-examine it.

Sect. 35 provides, "That nothing in this Act contained shall be construed to alter, change, or determine, or make void, any contracts, covenants, or agreements whatsoever be-

(*y*) *Jones v. Morris*, 3 Exch. 742. (*z*) *Wilton v. Dunn*, 17 Q. B. 294.

tween landlord and tenant, or any other persons, touching the payment of taxes and assessments in England, Wales, and Berwick-upon-Tweed, anything herein contained to the contrary notwithstanding."

By sect. 4 of the above statute, the tax is to be rated upon all hereditaments, &c., and upon "all and every person or persons, &c., having or holding, &c., such premises in respect thereof" (a). As between the tenant and the public, it is a tenant's tax (b); but the tenant is entitled to deduct out of the current or accruing rent, at the time when it is payable, so much of the amount payable for the tax as the landlord would have to pay upon the rent reserved (c); and this is so even where the premises have been improved in value,—the tenant having to pay the tax upon the increased value, but being only entitled to deduct the old deduction upon the rent reserved (d).

As to the effect of special clauses in a lease relating to the payment of taxes, see *ante*, p. 80, Part 1, c. 4, s. 7, *Covenant to Pay Rates and Taxes*.

By the Property-Tax Act (e), occupiers of lands, &c., paying the duty of sevenpence in the pound on the annual value of lands, &c., in respect of the property thereof, may deduct sevenpence in the pound on the amount of their rent out of the first payment afterwards made on account of it, and the landlords are to allow the deduction under a penalty of £50, and any stipulation made or to be made for payment in full, without allowing such deduction, will be void (f); and it is by the same statute enacted, "That no contract, covenant, or agreement between landlord and tenant, or any other person, touching the payment of taxes and assessments to be charged on their respective premises, shall be deemed or construed to extend to the duties charged thereon under this Act, nor be

Income-tax.

(a) See *per* Bayley, J., *Ward v. Const.*, 10 B. & C. 647; *Chelsea Waterworks v. Bowley*, 17 Q. B. 321. (c) 5 & 6 Vict. c. 35, s. 60, Rule 4-9.

(b) *R. v. Mitcham*, Cald. 276 a; *Watson v. Home*, 7 B. & C. 285; *Ward v. Const.*, 10 B. & C. 460. (f) *Id.* s. 103. See *Fuller v. Abbott*, 4 Taunt. 105; *Tinkler v. Prentice*, 4 Taunt. 549; *Howe v. Synge*, 15 East. 440; *Att.-Gen. v. Shield*, 3 H. & N. 834, 28 L. J. Ex. 49; *Festing v. Tayler*, 3 B. & S. 231, 32 L. J. Q. B. 41. See also *Abadam v. Abadam*, 33 Beavan, 475, 33 L. J. Ch. 593.

(c) *Andrew v. Hancock*, 1 B. & B. 37.

(d) *Yeo v. Leman*, 2 Str. 1101, 1 Wils. 21; *Hyde v. Hill*, 3 T. R. 377; *Graham v. Wade*, 16 East. 29; *Whitfield v. Brandwood*, 2 Starkie, 441; *Watson v. Holme*, 7 B. &

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binding contrary to the intent and meaning of this Act; but that all such duties shall be charged upon and paid by the respective occupiers, subject to such deductions and repayments as are by this Act authorised and allowed, and all such deductions and repayments shall be made and allowed accordingly, notwithstanding such contracts, covenants, or agreements" (g).

The property-tax, like the land-tax, is a tenant's tax, as between the tenant and the public(h); and if he omit to deduct it in his next payment of rent, he cannot afterwards recover it as money paid to the use of the landlord(i). By the 27 Vict. c. 18, s. 15, he may now deduct it during the period through which the rent was accruing due.

A payment of income-tax by the tenant operates as a payment *pro tanto* of the rent (j).

Sewers' rates.

The sewers' rate, though not imposed directly by Act of Parliament, and therefore not to be considered as a parliamentary tax, may be levied on the tenant or occupier of the premises subject to it. And after he has paid it, he is entitled to deduct from the next payment of his current rent so much of the rate as the landlord ought to bear, in like manner as in respect to land-tax (k).

Poor-rates.

The poor-rate is not a tax on the land, but a personal charge in respect of the land. In general, the occupier is liable to pay this tax, for the rate is a charge on the occupier in respect of his possession, and not upon the lessor in respect of the rent received (l). A landlord cannot be rated to the poor, even in respect of houses let to tenants who have been excused their rates on account of their poverty (m). By the Small Tenements' Rating Act (n), however, the landlord might be rated instead of the occupier, where the rateable value of the premises did not exceed £6, and such occupiers might deduct the amount from the rent. With respect to tenements in parishes wholly or partly in a parliamentary borough, the

(g) 5 & 6 Vict. c. 35, s. 73.

(h) *Cumming v. Bedborough*, 15 M. & W. 438.

(i) *Ibid.*

(j) *Franklin v. Carter*, 1 C. B. 750, cited 15 M. & W. 441.

(k) See *ante*, Land-tax, p. 164.

Smith v. Humble, 15 C. B. 321;

Palmer v. Earith, 14 M. & W. 428;

Brewster v. Kitchell, 2 Salk. 616;

Waller v. Andrews, 3 M. & W. 312.

(l) *Rowls v. Gells*, Cowp. 452, 1

Dougl. 304, 43 Eliz. c. 2, s. 1. As to deduction of rate in respect of sporting, see 37 & 38 Vict. c. 54, s. 6, *infra*; and see s. 8 as to rating of mines, and see *Duke of Devonshire v. Barrow Hematite Steel Co.*, 46 L. J. Q. B. 435.

(m) *Rex v. The Hull Dock Co.*, 3 B. & C. 516.

(n) 13 & 14 Vict. c. 99; repealed in 32 & 33 Vict. c. 41, s. 6.

liability of the landlord in this respect ceased under the Reform Act of 1867 (o) and the 32 and 33 Vict. c. 41, s. 6. By the 32 and 33 Vict. c. 41, s. 1, occupiers of tenements let for not more than three months may deduct the poor-rate from their rents; and by sect. 8, where an owner having undertaken to pay the rates omits to do so, the occupier may pay and deduct the amount from his rent; and see sect. 12, where a distress is levied on the occupier (p).

Besides the poor-rate, there are various rates charged upon the occupiers of premises rateable to the relief of the poor. Other rates. The chief of these are the paving, watching, lighting, and water rates, the highway rates, the county and borough rates. These and others are, in general, regulated by the principles which govern the assessment to the poor-rates.

Under the Tithe Commutation Acts, the rent-charge, Tithe rent-charge. which is substituted in lieu of the tithes, is charged upon the land, and may be recovered by distress. Neither the landlord nor the tenant is, under these statutes, personally liable to pay it; but if the latter pays it he may deduct it from his rent, unless he has agreed with his landlord to take the charge upon himself (q). By the 14 & 15 Vict. c. 25, however, a convenient remedy is given to the landlord or succeed-

(o) 30 & 31 Vict. c. 102, s. 6.
 (p) By the Rating Act 1874, 37 & 38 Vict. c. 54, s. 3, the Poor Rate Acts are extended to rights of fowling, of shooting, of taking or killing game or rabbits, and of fishing, when severed from the occupation of the land.

By s. 6 (1). Where any right of fowling or of shooting, or of taking or killing game or rabbits, or of fishing (hereinafter referred to as a right of sporting) is severed from the occupation of the land, and is not let, and the owner of such right receives rent for the land, the said right shall not be separately valued or rated, but the gross and rateable value of the land shall be estimated as if the said right were not severed; and in such case if the rateable value is increased by reason of its being so estimated, but not otherwise, the occupier of the land may (unless he has specially contracted to pay such rate in the event of an increase) deduct from his rent such portion of any poor or other local rate as is paid by him in respect of

such increase; and every assessment committee, on the application of the occupier, shall certify in the valuation list or otherwise the fact and amount of such increase.

(2) Where any right of sporting when severed from the occupation of the land is let, either the owner or the lessee thereof, according as the persons making the rate determine, may be rated as the occupier thereof.

(3) Subject to the foregoing provisions of this section, the owner of any right or sporting, when severed from the occupation of the land, may be rated as the occupier thereof.

(4) For the purposes of this section, the person who, if the right of sporting is not let, is entitled to exercise the right, or who, if the right is let, is entitled to receive the rent for the same, shall be deemed to be the owner of the right.

(q) See the 6 & 7 Will. IV. c. 71, ss. 67, 80, 81; and *Griffinhoofe v. Daubaz*, 4 E. & B. 230, S. C. in error, 5 E. & B. 746.

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ing tenant who is obliged to pay the rent-charge which ought to have been paid by the previous tenant. It is provided by sect. 4 of this Act, that "if any occupying tenant of land shall quit, leaving unpaid any tithe rent-charge for or charged upon such land, which he was by the terms of his tenancy or holding legally or equitably liable to pay, and the tithe-owner shall give or have given notice of proceeding by distress upon the land for recovery thereof, it shall be lawful for the landlord, or the succeeding tenant or occupier, to pay such tithe rent-charge, and any expenses incident thereto, and to recover the amount or sum of money which he may so pay over against such first-named tenant or occupier, or his legal representatives, in the same manner as if the same were a debt by simple contract, due from such first-named tenant or occupier to the landlord or tenant making such payment."

4. APPORTIONMENT.

The lessee's liability to pay rent according to his agreement may be altered either by act of the parties or by act of law:—

1. Where the reversion of the lessor becomes severed by alienation. 2. Where the lessee's interest in part of the estate is destroyed, and the rent is payable only in respect of the residue. 3. Where the interest of the lessee expires before his rent becomes due. 4. Where the lessor dies before the rent becomes due, but the lessee's interest does not thereby expire.

1. As the rent is incident to the reversion, whenever the reversion is severed by act of the parties, the rent shall be apportioned (*r*); but the lessee's concurrence to the apportionment is necessary, unless it be settled by a jury (*s*). The rent will also be apportioned in the case of a severance of the reversion by act of law (*t*).

2. Rent will be apportioned where the lessee's interest in part of the thing demised is extinguished either by the act of parties, the act of law, or the act of God. If the tenant surrender a portion of his estate, or if the lessor enters upon part of the tenant's land for a forfeiture, or if part of the land

(*r*) Co. Litt. 148; *Collins v. Harding*, 1 Rolls. Abr. 234; *Doe d. Vaughan v. Meyler*, 2 M. & S. 276. (*t*) *Moody v. Garmon*, 1 Rolls. Abr. 237, l. 3, l. 12; *Rushen's case*, Dyer, 4 B; *Ewer v. Moyle*, Cro. Eliz. 771.
(*s*) *Bias v. Collings*, 5 B. & Ald. 876.

be recovered in an action for waste, the rent shall be apportioned (*u*). If the tenant be evicted out of a part of the land by force of a paramount title, the rent will be apportioned; but if he be evicted wrongfully by the landlord, the rent will be suspended for the whole, and will not be apportioned (*v*). But if the tenant use and occupy the residue he will have to pay for such use and occupation (*w*); if he does not occupy he cannot be sued (*x*).

Where a lease, not under seal, was made of lands, a portion of which was already leased to another in possession for a longer period, it was held that the lease was void as to the portion before leased, and that the rent could not be apportioned (*y*). But where the second lease was under seal, the case was held to be different, because such a lease passed the reversion with the rent thereon (*z*). Where there is a demise of premises and an entire rent reserved, if any part of the premises could not legally be demised, the whole demise is void (*a*). If two hereditaments are demised in one lease at distinct rents each is charged only with its own (*b*).

Where the lessor fails to fulfil his agreement in the chief object which had induced the lessee to become a party to it (as where he fails to give the exclusive privilege of sporting), the lessee cannot be said to have enjoyed under the agreement; and in an action for use and occupation, the tenant may show an eviction of part of the premises, and the amount of rent which the tenant ought to pay may be ascertained by a jury (*c*).

It seems that where part of land is lost to the lessee by the act of God,—he may insist that the rent be apportioned,—as if the sea break in and overflow a part of the land, the

- (*u*) *Smith v. Malings*, Cro. Jac. 160; *Fishe v. Campion*, 1 Roll. Abr. 234, l. 48, 235, l. 20; *Walker's case*, 3 Rep. 22, 1 Roll. Abr. 325, l. 23, 25.
 (*v*) *Smith v. Malings*, Cro. Jac. 160; *Walker's case*, 3 Rep. 22; *Stevenson v. Lambard*, 2 East. 575; *Boodle v. Campbell*, 7 M. & G. 386. See also *Morrison v. Chadwick*, 7 C. B. 283; *Newton v. Allin*, 1 Q. B. 518.
 (*w*) *Stokes v. Cooper*, 3 Camp. 514, note; but see *Burns v. Phelps*, 1 Stark. R. 94.
 (*x*) *Smith v. Raleigh*, 3 Camp. 513.
 (*y*) *Neale v. Mackenzie*, in error, 1 M. & W. 747; *Holgate v. Kay*, 1 C. & K. 341; *Eccl. Commissioners of Ireland v. O'Connor*, 9 Ir. Com. L. R. 242.
 (*z*) *Eccl. Commissioners of Ireland v. O'Connor*, 9 Ir. Com. L. R. 242.
 (*a*) *Doe d. Griffiths v. Lloyd*, 3 Esp. 78.
 (*b*) *Tanfield v. Rogers*, Cro. Eliz. 341.
 (*c*) *Tomlinson v. Day*, 2 B. & B. 680. See the judgment of the Court by Lord Denman in *Neale v. Mackenzie*, 1 M. & W. 764.

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rent shall be apportioned (*d*). Where lands and goods are let at an entire rent, and the tenant is evicted from the lands, no apportionment of the rent can be made for the goods, as rent issues from the land alone (*e*). In *Salmon v. Matthews* (*f*), however, it appears to have been thought that the rent might be apportioned; but the case was decided on the ground that there was evidence for the jury to infer a fresh agreement to pay for the use of the goods.

3. Where the interest of the lessee expires before his rent becomes due, it cannot be apportioned (*g*). But by the 11 Geo. II. c. 19, s. 15, after reciting "that where any lessor or landlord having only an estate for life in the lands, tenements, or hereditaments demised, happens to die before or on the day on which any rent is reserved or made payable, such rent, or any part thereof, is not by law recoverable by the executors or administrators of such lessor or landlord, nor is the person in reversion entitled thereto, any other than for the use and occupation of such lands, tenements, or hereditaments, from the death of the tenant for life, of which advantage hath been often taken by the under-tenants, who thereby avoid paying anything for the same;" it is enacted, "That where any tenant for life shall happen to die before or on the day on which any rent was reserved or made payable upon any demise or lease of any lands, tenements, or hereditaments, which determined on the death of such tenant for life, the executors or administrators of such tenant for life shall and may, in an action on the case, recover of and from such under-tenant or under-tenants of such lands, &c., if such tenant for life die on the day on which the same was made payable, the whole, or if before such day, then a proportion, of such rent, according to the time such tenant for life lived, of the last year, or quarter of a year, or other time in which the said rent was growing due as aforesaid, making all just allowances, or a proportionable part thereof respectively."

A tenant in tail is within the statute, and his executors are entitled to an apportionment (*h*). No apportionment of rent

(*d*) 1 Roll. Abr. 236, l. 46.

(*e*) *Emott's case*, Dyer, 212 b, in margin; *Collins v. Harding*, Cro. Eliz. 606; *Cadogan v. Kennett*, Comp. 432; *Gilb. Rents*, 175.

(*f*) 8 M. & W. 827.

(*g*) *Countess of Plymouth v. Throgmorton*, 1 Salk. 65; *Clun's case*, 10 Rep. 127 b; *Jenner v. Morgan*, 1 P.

W. 392; *Edwards v. Countess of Warwick*, 2 P. W. 176; *Hay v. Palmer*, ib. 502; *Lord Strafford v. Lady Wentworth*, 1 P. W. 180; *Lord Rockingham v. Penrice*, ib. 177; *Slack v. Sharp*, 8 A. & E. 366.

(*h*) *Whitfield v. Pindar*, cited in 2 Bro. C. C. 662, 8 Ves. 311.

takes place as between the heir and the personal representatives of a tenant in fee, but the heir is entitled to the whole rent (*i*). Nor does the statute apply to a case where a tenancy from year to year has been originally created by the owner of the fee, and the tenant for life claiming under the lessor dies; for his death does not determine the tenancy (*j*). Where a lease made by a tenant for life or in tail does not terminate with his death, as if made in pursuance of a power or conformably with a statute, the rent is not apportioned; but if it terminate with his death, an apportionment takes place (*k*).

By 4 & 5 Will. IV. c. 22, s. 1, "Rents reserved and made payable on any demise or lease of lands, tenements, or hereditaments, and which have been and shall be made, and which leases or demises determined or shall determine on the death of the person making the same (although such person was not strictly tenant for life thereof), or on the death of the life or lives for which such person was entitled to such hereditaments, shall, so far as respects the rents reserved by such leases, and the recovery of a proportion thereof by the person granting the same, his or her executors or administrators (as the case may be), be considered within the provisions of the said recited Act" (11 Geo. II. c. 19).

By sect. 2, "All rents-service reserved on any lease by a tenant in fee, or for any life interest, or by any lease granted under any power (and which leases shall have been granted after the passing of this Act), and all rents-charge, and other rents, annuities, pensions, dividends, moduses, compositions, and all other payments of every description in the United Kingdom of Great Britain and Ireland, made payable or coming due at fixed periods, under any instrument that shall be executed after the passing of this Act, or (being a will or testamentary instrument), that shall come into operation after the passing of this Act, shall be apportioned so, and in such manner, that on the death of any person interested in any such rents, annuities, pensions, dividends, moduses, compositions, or other payments as aforesaid, or in the estate, fund, office, or benefice from or in respect of which the same shall

(i) *Re Clulow*, 3 K. & J. 689, 26 L. J. Ch. 513; *Lord Rockingham v. Penrice*, 1 P. W. 177.

(j) *Catley v. Arnold*, 28 L. J. Ch. 352; *Mills v. Trumper*, L. R. 4 Ch. Ap. 320.

(k) *Symons v. Symons*. Madd. &

Geld. 207; *Clarkson v. Earl of Scarborough*, 1 Swans. 354, note; *Stratford v. Wentworth*, Freo. Ch. 555; *ex parte Smythe*, 1 Swans. 337. See further notes to 2 Chitty's Statutes, "Landlord and Tenant," p. 1122.

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be issuing or derived, or on the determination by any other means whatsoever of the interest of any such person, he or she, or his or her executors, administrators, or assigns, shall be entitled to a proportion of such rents, annuities, pensions, dividends, moduses, compositions, and other payments, according to the time which shall have elapsed from the commencement or last period of payment thereof respectively (as the case may be), including the day of the death of such person, or of the determination of his or her interest, all just allowances and deductions in respect of charges on such rents, annuities, pensions, dividends, moduses, compositions, and other payments being made; and every such person, his or her executors, administrators, and assigns, shall have such and the same remedies at law and in equity for recovering such apportioned parts of the said rents, annuities, pensions, dividends, moduses, compositions, and other payments, when the entire portion of which such apportioned parts shall form part shall become due and payable, and not before, as he, she, or they would have had for recovering and obtaining such entire rents, annuities, pensions, dividends, moduses, compositions, and other payments, if entitled thereto, but so that persons liable to pay rents reserved by any lease or demise, and the lands, tenements, and hereditaments comprised therein, shall not be resorted to for such apportioned parts specifically as aforesaid, but the entire rents of which such portion shall form part shall be received and recovered by the person or persons who, if this Act had not passed, would have been entitled to such entire rents, and such portions shall be recoverable from such person or persons by the parties entitled to the same under this Act in any action or suit at law, or in equity."

By sect. 3, "The provisions herein contained shall not apply to any case in which it shall be expressly stipulated that no apportionment shall take place, or to annual sums made payable in policies of assurance of any description."

The provisions of this Act are extended to rent-charges payable under 6 & 7 Will. IV. c. 71, s. 86, and to rent-charges payable under 4 & 5 Vict. c. 35, s. 50.

The statute extends the doctrine of apportionment to rents, annuities, dividends, and other payments coming due at fixed periods (*1*). It also applies to rents, &c., reserved by leases

(1) *St. Aubyn v. St. Aubyn*, 30 L. J. Ch. 917.

granted after the Act under a power given before the Act (*m*). It only applies to rents reserved by instruments in writing (*n*). The statute does not apply where the party entitled to the rent himself determines the lease during a current quarter (*o*). A testator gave the residue of his real and personal estate to trustees upon trust to receive and accumulate the rents and profits till his nephew should attain twenty-one, when he was to be put into possession for his life. It was held that the trustees were entitled to an apportionment of the rents up to that period (*p*).

By the Apportionment Act, 1870 (*q*), after reciting the 11 Geo. II. c. 19, the 4 & 5 Will. IV. c. 22, the 6 & 7 Will. IV. c. 72, 14 & 15 Vict. c. 25, and the 23 & 24 Vict. c. 154, it is enacted by sect. 2, that from and after the passing of this Act, all rents, annuities, dividends, and other periodical payments in the nature of income (whether reserved or made payable under an instrument in writing or otherwise), shall, like interest on money lent, be considered as accruing from day to day, and shall be apportionable in respect of time accordingly.

By sect. 3, the apportioned part of any such rent, annuity, dividend, or other payment, shall be payable or recoverable, in the case of a continuing rent, annuity, or other such payment, when the entire portion of which such apportioned part shall form part shall become due and payable, and not before; and in the case of a rent, annuity, or other such payment determined by re-entry, death, or otherwise, when the next entire portion of the same would have been payable, if the same had not so determined, and not before.

By sect. 4, all persons, and their respective heirs, executors, administrators, and assigns, and also the executors, administrators, and assigns respectively of persons whose interests determine with their own deaths, shall have such or the same remedies at law and in equity for recovering such apportioned parts as aforesaid, when payable (allowing proportionate parts

(*m*) *Plummer v. Whitely*, 1 Johns. 320. But see *infra*, 33 & 34 Vict. c. 35.
 585, 29 L. J. Ch. 247; *Wardroper v. Cutfield*, 33 L. J. Ch. 605;
 (*n*) *Llewellyn v. Rous*, L. R. 2 Eq. 27, 35 Beav. 591.
 (*o*) *In re Markby*, 4 M. & Craig, 484; *Cattley v. Arnold*, 1 John. & Hemming, 651, 28 L. J. Ch. 353;
 (*p*) *Mills v. Trumper*, L. R. 4 Ch. Ap. 471.
 (*q*) 33 & 34 Vict. c. 35.

CHAP. I. of all just allowances), as they respectively would have had for recovering such entire portions as aforesaid, if entitled thereto respectively; provided that persons liable to pay rents reserved out of or charged on lands, or other hereditaments of any tenure, and the same lands, or other hereditaments, shall not be resorted to for any such apportioned part forming part of an entire or continuing rent as aforesaid specifically, but the entire or continuing rent, including such apportioned part, shall be recovered and received by the heir, or other person, who, if the rent had not been apportionable under this Act, or otherwise, would have been entitled to such entire or continuing rent, and such apportioned part shall be recoverable from such heir, or other person, by the executors or other parties entitled under this Act to the same, by action at law or suit in equity.

By sect. 5, in the construction of this Act :—

The word “rents” includes rent-service, rent-charge, and rent-seck, and also tithes, and all periodical payments or renderings in lieu of, or in the nature of rent or tithe.

By sect. 7, the provisions of this Act shall not extend to any case in which it is, or shall be expressly stipulated, that no apportionment shall take place.

4. Where the lessor dies before the rent becomes due, but the lessor's interest does not thereby expire, the rent is payable to the heir or remainder-man. If the lessor dies after the rent has become due, it is payable to his executor (*r*); and so of tenant for life, where the lease is not determined by his death (*s*); for the statutes above cited do not apply to cases where the lease is not determined by the death of the lessor (*t*).

It was held that the proper action in which to apportion rent between a lessor and lessee was an action of debt, and it could not be apportioned in an action of covenant by lessor against lessee, such action being personal; but in covenant against an assignee whose obligation arose from privity of estate, and not of contract, the case was different against him, therefore the rent might be apportioned in an action of covenant (*u*).

(*r*) *Duppa v. Mayo*, 1 Saund. v. *Lady Wentworth*, 9 Mod. 21; 287. 1 P. Wms. 180.

(*s*) *Norris v. Harrison*, 2 Mad. (1) *Ante*, p. 132.

Ch. R. 269; *Barwick v. Foster*, (u) *Stevenson v. Lambard*, 2 East. Cro. Jac. 227, 233; Lord Strafford 575.

SECTION I.

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1. ACTION.

In order to enforce payment of the rent in arrear, the land-lord might bring an action of either debt for use and occupation or covenant (*a*). If the demise was not by deed, an action of covenant (*b*) did not lie (*c*); but the landlord might bring an action of debt on simple contract (*d*), or of assumpsit for the use and occupation of the premises. The remedies by debt and covenant existed at common law, but the action of

(*a*) After the Common Law Procedure Act, 1852, an action for use and occupation might be considered either as an action on the case, founded on 11 Geo. II. c. 19, s. 14 (see *infra*), or as an action of debt at common law.

(*b*) As to what words constitute a covenant, see *ante*, pp. 78, 79.

(*c*) If there was a mere agreement by deed to demise, an action for use and occupation might be maintained. *Elliot v. Rogers*, 4 Esp. 59; *Gudgen v. Bessett*, 6 E. & B. 986.

(*d*) *Wilkins v. Wingate*, 6 T. R. 62; *Stroud v. Rogers*, 6 T. R. 63 n; *Elger v. Marsden*, 5 Taunt. 25; *Gibson v. Kirk*, 1 Q. B. 850.

CHAP. I. § 1. assumpsit was given by statute, 11 Geo. II. c. 19, s. 14 (e). Where a distress has been made, an action will not lie (see *post*, p. 140).

Use and
occupation.

By 11 Geo. II. c. 19, s. 14, "To obviate some difficulties that many times occur in the recovery of rents, where the demises are not by deed, it shall and may be lawful to and for the landlord or landlords, where the agreement is not by deed, to recover a reasonable satisfaction for the lands, tenements, or hereditaments, held or occupied by the defendant or defendants in an action on the case, for the use and occupation of what was so held or enjoyed; and if in evidence on the trial of such action, any parol demise, or any agreement (not being by deed), whereon a certain rent was reserved, shall appear, the plaintiff in such action shall not therefore be non-suited, but may make use thereof as an evidence of the *quantum* of the damages to be recovered." The action will now be in the usual form, and will be a claim in respect of mesne profits or arrears of rent (see Jud. Act, 1875, Order XVII., Rule 2).

An action for use and occupation was always founded on some contract, express or implied (*f*), and the defendant must have occupied the premises under such express or implied contract (*g*). Thus a tenant who agrees to take lodgings, but does not enter, was not liable for use and occupation (*h*). But where there is no express or implied contract, and the defendant is a mere wrong-doer or trespasser, this action would not lie (*i*); nor would such an action lie if it were proved that the plaintiff's title expired after the demise, and before the period in respect of which the action was brought, although there had not been any eviction, and the possession had not been given up to the plaintiff (*j*).

(e) See Selwyn's *Nisi Prius*, tit. Use and Occupation.

(f) *Birch v. Wright*, 1 T. R. 378, 387; *Beverley v. Lincoln Gas Light and Coke Co.*, 6 A. & E. 829; *Gibson v. Kirk*, 1 Q. B. 850; *Churchward v. Ford*, 2 H. & N. 446, 26 L. J. Ex. 354.

(g) *Marquis of Camden v. Batterbury*, 5 C. B. N.S. 808, 7 Id. 864, 28 L. J. C. P. 335; *Levi v. Lewis*, 6 C. B. N.S. 766, 9 Id. 872; *Hall v. Burgess*, 5 B. & C. 333; *Hellier v. Silcox*, 19 L. J. Q. B. 295, explained in *Churchward v. Ford*, 2 H. & N. 446, 449, 450; *Smith v. Elridge*, 15 C. B. 236; *Smith v. Twoart*, 2 M. & G. 841; *Bailey v. Bradley*, 5 C.

B. 396; *Salmon v. Matthews*, 8 M. & W. 833; *Dunk v. Hunter*, 5 B. & A. 325; *Hegan v. Johnston*, 2 Taunt. 148.

(h) *Edge v. Strafford*, 1 C. & J. 391; *Lowe v. Ross*, 19 L. J. Ex. 318, 5 Exch. 553; *Towne v. D'Heindrich*, 13 C. B. 892, 22 L. J. C. P. 219.

(i) *Marquis of Camden v. Batterbury*, *supra*; *Churchward v. Ford*, *supra*; *Tew v. Jones*, 13 M. & W. 12; *Turner v. Cameron's Coalbrook Co.*, 5 Exch. 392, 20 L. J. Ex. 71; *Levi v. Lewis*, *supra*.

(j) *Mountnoy v. Collier*, 1 E. & B. 630.

In order to support this action under the statute, it was sufficient if there was an actual holding on the part of the tenant, and if he had the power to occupy the premises so far as depended on the landlord. Thus the tenant would be liable for use and occupation, although the premises were destroyed by fire (*k*). And it was sufficient if the tenant allowed another person to occupy (*l*). If a lease was made to two persons, and one held over at its expiration, without the assent of the other, they were not both liable for use and occupation (*m*).

CHAP. I. § 1.

The action of debt for rent was founded upon privity of contract, express or implied (*n*), or sometimes upon privity of estate (*o*). Unlike the action for use and occupation, it could be brought where the demise was by deed (*p*). At common law, this action did not lie for rent reserved on a freehold lease (*q*). But by the 8 Anne, c. 14, s. 4, any persons entitled to rent in arrear on a lease for life or lives, may have an action of debt during the existence of the life, as on a lease for years during the term. An entry by the tenant on the premises demised was not necessary to support this action, as in the action for use and occupation (*r*). So an assignee of the term, who had never entered to take possession as assignee, might be liable to an action for the rent (*s*), but not to an action for use and occupation (*t*). So a husband was not liable in an action for use and occupation to pay for the enjoyment of a house by his wife *dum sola*; such occupation not having been by him, nor at his request (*u*); but he would have been liable to an action for the rent, the declaration being framed specially according to the facts.

(*k*) See *Pindar v. Ainsley*, cited in the judgment in *Belfour v. Weston*, 1 T. R. 312; *Baker v. Holtzappel*, 4 Taunt. 45; *Leeds v. Cheetham*, 1 Sim. 146; *Izon v. Gorton*, 5 Bing. N. C. 501; *Packer v. Gibbins*, 1 Q. B. 421; *Surplice v. Farnsworth*, 7 M. & G. 576; *Loft v. Dennis*, 1 E. & E. 856.

(*l*) *Bull v. Sibbs*, 8 T. R. 327; *Bertie v. Beaumont*, 16 East. 33; *Waring v. King*, 8 M. & W. 571; *Christy v. Tansed*, 7 M. & W. 127, 9 M. & W. 438, 12 M. & W. 316.

(*m*) *Draper v. Crofts*, 15 M. & W. 166.

(*n*) *Bull*, N. P. 167.

(*o*) *Lord Ward v. Lumley*, 5 H. & N. 87, 656, 29 L. J. Ex. 322.

(*p*) *Gibson v. Kirk*, 1 Q. B. 850, 474.

(*q*) *Bishop of Winchester v. Wright*, 2 Lord Raymond, 1056; *Kelly v. Clubbe*, 3 B. & B. 130.

(*r*) *Bellasis v. Burbrick*, 1 Salk. 209; *Bull v. Sibbs*, 8 T. R. 327; *Smith v. Scott*, 6 C. B. N.S. 781, per Willes, J. See also *Alexander v. Dyer*, Cro. Eliz. 169.

(*s*) *Ringer v. Cann*, 3 M. & W. 343; *Burton v. Barclay*, 7 Bing. 745, 761; *Williams v. Bosanquet*, 1 B. & B. 238.

(*t*) *How v. Kennett*, 3 A. & E. 659; *Lowe v. Roas*, 5 Exch. 556; *Clarke v. Webb*, 1 C. M. & R. 29; *Jones v. Reynolds*, 7 C. & P. 335.

(*u*) *Richardson v. Hall*, 1 B. & B. 50.

CHAP. I. § 1.

By 3 & 4 Will. IV. c. 42, s. 3, a limitation of twenty years is imposed on actions of debt for rent upon an indenture of demise.

Rent when due, but not accruing rent, may be attached under the 17 & 18 Vict. c. 125, s. 61 (*v*).

2. DISTRESS.

Definition of
Distress.

Another mode of enforcing the payment of rent is by distress. A distress is the taking of a personal chattel out of the possession of the wrong-doer, into the custody of the party injured, to procure a satisfaction for the wrong committed (*w*), and is the remedy most frequently resorted to by landlords for obtaining payment of rent in arrear. And when resorted to, it is a bar to an action for rent, so long as the goods continue in the landlord's hands as a pledge unsold (*x*). Inasmuch as, strictly speaking, rent can issue out of real property only, there can be no distress for payments made for the use of personal property, which are sometimes also called rents. When, however, personal and real property are let together, there may be a distress for the rent, because it issues wholly out of the real part of the property demised (*y*).

The thing taken, as well as the process, is sometimes called a distress.

The rent must be certain, and not subject to conditional deductions, or the landlord will not be entitled to distrain (*z*). Neither can he distrain where the amount of rent is not fixed by the demise, although he may do so as soon as it has been ascertained, whether by the actual payment of a certain rent, or in any other manner (*a*).

(a.) WHO MAY DISTRAIN.

Who may
distrain.

In order to warrant a distress, the relation of landlord and tenant must exist. If, therefore, a termor parts with the

(*v*) *Mitchell v. Lee*, 8 B. & S. 92, 361; *Riseley v. Ryle*, 11 M. & W. L. R. 2 Q. B. 259; *Jones v. Thompson*, 27 L. J. Q. B. 234. 16; *Watson v. Waud*, 8 Exch. 335; *Hancock v. Austin*, 14 C. B. N.S. 634. See *Daniel v. Gracie*, 6 Q. B. 145; *Doe d. Edney v. Benham*, 7 Q. B. 576. The right to distrain may exist by express agreement, although not reserved upon what is strictly a rent. See *Pollitt v. Forrest*, 11 Q. B. 949.

(*w*) 3 Bl. Com. 6.

(*x*) *Lehain v. Philpot*, 44 L. J. Ex. 225; L. R. 10 Exch. 242.

(*y*) *Newman v. Anderton*, 2 N. R. 224. And see *Baynes v. Smith*, 1 Esp. N. P. 206.

(*z*) *Regnart v. Porter*, 7 Bing. 451.

(*a*) *Knight v. Bennett*, 3 Bing.

whole of his interest in the term, whether by assignment or in any other way, reserving a rent, he has no power of distress without a special clause of distress, because there is no tenancy (*b*); and if he underlet, so as to reserve a reversion to himself, yet when his own term is expired, his remedy by distress against his under-tenant is gone (*c*). A tenant from year to year, however, underletting from year to year, has such a reversion as will entitle him to distrain (*d*). Where a party is in possession in contemplation only of a tenancy, there is no demise, and consequently no reversion to which the power of distress can attach (*e*), unless the agreement under which possession is taken goes on to say that until a lease be executed the rent and covenants shall be enforced as if such lease had actually been executed (*f*). As soon as a tenancy is constituted, and rent is in arrear, the landlord may distrain (*g*). The landlord of a tenant at will may distrain (*h*). Where the landlord has elected to treat the party in possession of his land as a trespasser, he cannot distrain, although the possession be continued up to the day of the distress (*i*), nor can he distrain after the expiration of a notice to quit, without some evidence, at least, of a renewal of the tenancy (*j*). So where the tenant has been evicted by title paramount, and remains in possession under the person evicting, the original landlord cannot distrain (*k*). As to the effect of the bankruptcy of the tenant upon the landlord's right to distrain, see *post*, Part 4, c. 2, s. 2.

Joint-tenants are seised *per my et per tout*; and therefore, ^{Who may dis-} as every joint-tenant has an estate in every part of the rent, ^{train—Joint-} tenants.

(*b*) *Butt's case*, 7 Rep. 101; Lord Mountjoy's case, 5 Rep. 4; *Earl of Stafford v. Buckley*, 2 Ves. 170; *Turner v. Turner*, 1 Bro. Ch. Rep. 316; Bro. Abr. Debt, pl. 39; *Pouletney v. Holmes*, Str. 405; — *v. Cooper*, 2 Wils. 375; *Smith v. Mapleback*, 1 T. R. 441; *Hoby v. Roebuck*, 7 Taunt. 157; *Jalentine v. Denion*, Cro. Jac. 111; *Parmenter v. Webber*, 8 Taunt. 593; *Preece v. Corrie*, 5 Bing. 25; *Palmer v. Edwards*, 1 Doug. 187; *Pollock v. Stacey*, 9 Q. B. 1033.

(*c*) *Burne v. Richardson*, 4 Taunt. 720. (*d*) *Curtis v. Wheeler*, 1 M. & M. 493. (*e*) *Hegan v. Johnson*, 2 Taunt. 148. (*f*) *Anderson v. Midland Ry. Co.*, 3 E. & E. 614; 30 L. J. Q. B. 94; for this is a demise at will upon the terms of a fixed rent.

(*g*) *Cox v. Bent*, 5 Bing. 182, 2 Moo. & P. 281; *Mann v. Lovejoy*, 1 Ry. & M. 355; *Doe d. Westmoreland, v. Smith*, 1 Man & R. 137; *Braithwaite v. Hitchcock*, 10 M. & W. 494.

(*h*) 3 & 4 Will. IV. c. 42, s. 37, *post*, p. 145; *Doe d. Davies v. Thomas*, 6 Exch. 854, *per* Martin B. citing Co. Litt. 57 b; 8 Anne, c. 14, ss. 6, 7. *Turner v. Barnes*, 31 L. J. Q. B. 170; 2 B. & S. 435.

(*i*) *Bridges v. Smyth*, 2 Moo. & P. 740, 5 Bing. 410.

(*j*) *Jenner v. Clegg*, 1 Moo. & R. 213.

(*k*) *Hopcroft v. Keys*, 9 Bing. 613.

CHAP. I. § 1. he may distrain alone for the whole, although he must afterwards avow jointly with his co-tenants, or make cognisance as their bailiff, and account to them for their respective shares; and it is immaterial whether he make the distress by his own hand or the hand of another, and, therefore, he may appoint a bailiff to distrain for the whole rent (*l*), without the assent of his fellows (*m*). So the survivor may distrain for the arrears accrued in the lifetime of his deceased co-tenant (*n*).

Who may distrain—Co-parceners.

Co-parceners before partition are considered in law but as one heir (*o*), and therefore must join in making a distress (*p*), but after partition they may make several distresses (*q*). The same rule governs co-heirs in gavelkind, who are parceners by custom (*r*). One, however, may distrain for rent due to him and his fellows without an actual authority from them, and avow in his own right, and make cognisance as their bailiff (*s*).

Who may distrain—Tenants in common.

Tenants in common, not holding by one title, and possessing several estates, although they may join in an action for rent (*t*), yet, if they distrain, must make several distresses, and avow separately (*u*). And where one, holding under two tenants in common, paid the whole rent to one of them, after notice from the other not to do so, it was held that he who gave the notice might distrain for his share of the rent (*v*). But it seems that, upon a lease by tenants in common, the survivor may distrain for the whole rent, although the reversion be to the lessors, according to their respective interests (*w*); and one tenant in common may lease his share to another, rendering rent, for which he may distrain as if he had demised to a stranger (*x*).

Who may distrain—Husband and wife.

With regard to the lands of a married woman, the wife can in no case whatever distrain alone, but the husband may in all cases distrain, and even avow alone, during the life of the

- (*l*) Pullen v. Palmer, 3 Salk. 207. (*t*) Midgley v. Lovelace, Carth. 289.
 (*m*) Leigh v. Shepherd, 2 B. & B. 465; Robinson v. Hofman, 4 Bing. 561. (*u*) Litt. s. 317; Whitley v. Roberts, 1 M'Clel. & Y. 107; Pullen v. Palmer, 3 Salk. 207.
 (*n*) 2 Rol. Abr. 86. (*v*) Harrison v. Barnby, 5 T. R. 246.
 (*o*) Co. Litt. 163 b. (*w*) Wallace v. M'Laren, 1 Man. & Ryl. 516.
 (*p*) Stedman v. Page, 1 Salk. 390. (*x*) Snelgar v. Henston, Cro. Jac. 611.
 Gilb. Distress, 161.
 (*q*) Co. 174 b, 195 b.
 (*r*) Litt. ss. 241, 265.
 (*s*) Leigh v. Shepherd, 2 B. & B. 465.

wife, for rent accruing during the coverture (*y*). Further, by the 32 Hen. VIII. c. 37, s. 3, if a man have, in the right of his wife, any estate in fee-simple, fee-tail, or for term of life, of or in any rents or fee-farms, and the same be due, behind, and unpaid in the wife's life, then the husband, after the death of the wife, may distrain for the said arrearages, in like manner and form as he might have done if his wife had been then living. It has been held that this statute enables the husband not only to distrain for arrears accruing during the coverture, for which, at the common law, he could have sued in his own name (*z*), but also for arrears accrued before coverture (*a*), which, previously to the statute, could only have been recovered in an action brought by the husband, not in his own name, but as his wife's personal representative (*b*). It will be observed that the remedy by distress is given to the husband alone, and is not extended to his executors and administrators (*c*). CHAP. I. § 1.

At the common law, tenant *pur autre vie* could of course distrain in the lifetime of the *cestui que vie*; and by the 32 Henry VIII. c. 37, s. 4, he may distrain for rent in arrear at the death of the *cestui que vie*. Who may distrain—Tenant *pur autre vie*.

Tenant by *elegit* may distrain without attornment so long as the debt is unpaid, and the interest of his execution debtor continues (*d*); but as he is not within the 32 Hen. VIII. c. 37, his power of distress is gone as soon as the interest of the execution debtor is determined. Thus a tenant by *elegit* cannot distrain after the death of the tenant for life for arrears accrued in his lifetime (*e*). Who may distrain—Tenant by *elegit*.

A mortgagee can distrain upon the mortgagor in possession only where a tenancy has been created between them, and the rent ascertained (*f*). And it was held that even where there was a stipulation in the mortgage deed, that, upon a certain event happening, the mortgagor should become tenant to the mortgagee, which event happened, yet the mortgagee could not distrain until he had given notice of his intention Who may distrain—Mortgagee.

(*y*) North v. Wyard, 2 Bulst. 233; 4 T. R. 617; Parry v. Hindle, 2 Bowles v. Poore, Cro. Jac. 282; Taunt. 181.

(*z*) Wise v. Bellent, ib. 442; Pullen v. Palmer, 3 Salk. 207. (*d*) Lloyd v. Davies, 2 Exch. 103.

(*a*) Co. Litt. 162 b, 351 b, Ognel's Case, 4 Rep. 51. Bro. Distr. pl. 72.

(*b*) Co. Litt. 162 b. (*e*) Pool v. Neel, 2 Sid. 29; Pool v. Duncomb, Bull. N. P. 56.

(*c*) Sharp v. Pool, Bendl. 457. (*f*) Morton v. Woods, L. R. 3 Q. B. 658; 4 Q. B. 293; 37 L. J. Q. B. 242; 38 L. J. Q. B. 81.

(*e*) See Osborn v. Wickenden, 1 Saund. 197; Ankerstein v. Clarke,

CHAP. I. § 1. to treat the mortgagor as tenant (*g*). Where the property mortgaged has been leased before the mortgage, the mortgagee may distrain, immediately after giving notice of the mortgage to the tenant, for rent in arrear *at the time of the notice*, as well as for that which accrues afterwards; for the attornment of the tenant is rendered unnecessary by the 4 Anne, c. 16, s. 9, and the notice to the tenant has relation back to the date of the mortgage (*h*). Where the mortgaged premises are let by the mortgagor after the execution of the mortgage, the mortgagee cannot distrain on the tenant until a new tenancy has been created between them, as by the mortgagee accepting rent from the tenant (*i*), or giving the tenant notice to pay him the rent, in which the tenant has acquiesced (*j*). In such a case, the rents that have accrued between the commencement of the lease from the mortgagor, and of the new tenancy between the tenant and the mortgagee, cannot be recovered by the mortgagee by distress; but if the tenant refuse to pay, the mortgagee may evict him, and recover it in the form of mesne profits (*k*).

Who may distrain—Agents, bailiffs, receivers.

The distress is generally effected by means of a bailiff on behalf of the lessor, or other person entitled to distrain. The bailiff need not be a sworn bailiff under the 13 Edward I. c. 37 (*l*). He may be authorised to distrain by word of mouth (*m*), except in the case of a corporation aggregate, not having a superior (*n*); and a subsequent ratification of his act by the landlord will be equivalent to a previous appointment (*o*). If a landlord direct a bailiff to distrain, and then die, and the distress is made after his death, his executors may ratify the act of the bailiff (*p*). A mere authority to receive the rent will not, however, without more, authorise a distress for rent in arrear (*q*). A receiver of rents appointed by the Court of Chancery may distrain for arrears in the

(*g*) *Clowes v. Hughes*, L. R. 5 Ex. 160, 36 L. J. Ex. 62.

(*h*) *Moss v. Gallimore*, Doug. 279; *Rogers v. Humphreys*, 4 Ad. & El. 299.

(*i*) *Rogers v. Humphreys*, 4 Ad. & El. 299.

(*j*) *Doe d. Chawner v. Boulter*, 6 Ad. & El. 675; *Partington v. Woodcock*, ib. 680; *Evans v. Elliott*, 9 A. & E. 342; *Brown v. Storey*, 1 Mann. & G. 117; *Wilton v. Dunn*, 17 Q. B. 294.

(*k*) *Pope v. Biggs*, 9 B. & C. 421; *Evans v. Elliot*, 9 Ad. & E. 342.

(*l*) *Begbie v. Hayne*, 2 Bing. N.S. 124; *Child v. Chamberlain*, 6 Car. & P. 213.

(*m*) *Cary v. Matthews*, Salk. 191; *Manby v. Long*, 3 Leo. 107.

(*n*) *Randal v. Dean*, 2 Lutw. 149 b; Vin. Ab. vol. 3 p. 538.

(*o*) *Trevillian v. Payne*, 11 Mod. 112; *Anon. Goodb.* 109, 4 Vin. Ab. Bailiff (D), pl. 7; *Whitehead v. Taylor*, 10 Ad. & El. 212.

(*p*) *Whitehead v. Taylor*, 10 Ad. & E. 212.

(*q*) *Ward v. Shrew*, 9 Bing. 608, 2 M. & Sc. 756.

name of the lessor without the order of the Court (*r*). If, however, there is a doubt who is the lessor, he should obtain such an order for his own protection (*s*), as he can only distrain in the name of the person having the legal right to do so (*t*). Of course, if he is himself the actual lessor, he may distrain in his own name, and this although it appears on the face of the lease that he is a receiver only, and the rent is reserved to him in that capacity (*u*). CHAP. I. § 1.

Similarly, a guardian making leases in his own name may also distrain in his own name (*v*).

By the common law, upon the death of a lessor possessed of a freehold estate, the remedy by distress was gone, because the land went to the heir or remainder-man, while the rent in arrear at the time of the lessor's death went to his executor or administrator (*w*). Where, however, tenant for years underlet for years and died, the executor, or his representative *in infinitum*, so long as the term remained in them, could distrain for the arrears, for they were never separated from the reversion, and both belonged to the executor (*x*). Who may
distrain—
Executors and
Administrators.

The power to distrain was first extended to the executors and administrators of the lessor in the case of a lease for lives of freehold lands (*y*), by the 32 Hen. VIII. c. 37, s. 1 (*z*), which empowers them to distrain for the arrearages upon the lands charged while such lands are in the possession of the tenant, or of any one claiming by and from him by purchase, gift, or descent (*a*), in like manner and form as the testator might have done in his lifetime (*b*); and now, by the 3 & 4 Will. IV. c. 42, s. 37, the executors or administrators of any lessor or landlord may distrain upon the lands demised for any term, or at will, for the arrearages of rent due to such lessor or landlord in his lifetime, in like manner as he himself might have done. By sect. 38, the arrearages may be

- (*r*) Pitt v. Snowden, 3 Atk. 750. (*x*) Wade v. Marsh, Latch. 211;
 (*s*) Hughes v. Hughes, 3 Bro. 1 Rol. Abr. 672, 135.
 C. C. 87; See Rickman v. Johns, (*y*) Appleton v. Dolly, Yelv. 135.
 L. R. 6 Eq. 488. (*z*) Co. Litt. 162 b; Prescott v.
 (*t*) Hughes v. Hughes, 3 Bro. Boucher, 2 B & Ad. 859; Hool v.
 C. C. 87; Pitt v. Snowden, *supra*. Bell, Lord Raym. 572, S. C.;
 (*u*) Dancer v. Hastings, 4 Bing. Howell v. Bell, 3 Salk. 136.
 2 S. C. 12 Moore, 34. (*a*) Ognel's case, 5 Rep. 50 b;
 (*v*) Shopland v. Radler, Cro. Jac. Eldridge's case, 5 Rep. 118; Lam-
 55, 98; Bredell v. Constable, Vaugh. bert v. Austin, Cro. Eliz. 332; Lord
 179; Bennett v. Robins, 5 Car. & Fairfax v. Lord Derby, 2 Vern.
 P. 379. 612; Anon. 1 Leon. 302, pl. 418.
 (*w*) Co. Litt. 162 a. (*b*) Co. Litt. 162 b; Ognel's case,
 4 Rep. 50 b.

CHAP. I. § 1. distrained for after the end or determination of the term or lease at will, in the same manner as if the term or lease had not been ended or determined; but the distress must be made within six calendar months after the determination of the term or lease, and during the continuance of the possession of the tenant from whom the arrears became due, and all the powers and provisions in the several statutes relating to distresses for rent will be applicable to distresses so made.

An administrator cannot distrain before administration, nor justify the detention of goods distrained by the intestate for rent, and remaining under distress at his death; an executor, however, may distrain before probate (*c*). If an administrator makes an under-lease of a term of years of the deceased, reserving rent to himself, his executors, &c., it has been held that his executors, and not the administrator *de bonis non*, shall have the rent; but it would seem that, at common law, they could not distrain for it (*d*), because the reversion belongs to the administrator *de bonis non*, and a reversion is necessary to found the remedy by distress (*e*); there seems, however, no sufficient reason why the executors may not distrain under the 3 & 4 Will. IV. c. 42.

Sequestrators.

By the 12 & 13 Vict. c. 67, a sequestrator is empowered to levy a distress in his own name for the recovery of tithes, rents-charge, or rents, &c., payable to the incumbent of the sequestrated estate.

(b.) WHAT MAY BE DISTRAINED.

What things may
be distrained—
General rule.

The general rule is that all personal chattels found on the premises demised may be distrained for rent, whether they be the chattels of the tenant or of a third person (*f*). But to

(*c*) *Dejoncourt v. Rogers*, 8 Ir. L. Rep. 450. See *Whitehead v. Taylor*, 10 A. & E. 210.

(*d*) *Drue v. Baylie*, 1 Freem. 402, 2 Leo. 100.

(*e*) *Brawley v. Wade*, 1 M'Clel. 664; *Preece v. Corrie*, 2 Bing. 24; *Pluck v. Digges*, 2 Dow & C. 180; *Burne v. Richardson*, 4 Taunt. 720.

(*f*) *Gilb. Distr.* 33; 3 Bl. Com. 7. Cattle of a stranger upon the land are immediately liable to be distrained, *Read v. Burley*, Cro. Eliz. 549; *Gill v. Gawin*, 2 Rol. Rep. 124, except when they are turned in for

the night, with the privity of the lessor or lessee, on their way to market. *Tate v. Gleed*, 2 Wms. Saund. 290 (n) 7. If a stranger's cattle, by default of their owner, or by breaking the fences, escape, they are distrainable without being *levant and couchant*. *Hargreaves, Co. Litt.* 47 b, note 301; *Poole v. Longueville*, 2 Saunds. 290, note 7; *Kemp v. Cruwes*, 2 Lutw. 1580; *Reynolds v. Oakley*, 1 Brownl. 170. But if they escape through default of the tenant, they cannot be distrained by the landlord for rent-service until they

this general rule there are several exceptions; for (1.) some things which are not personal chattels have been rendered distrainable by different statutes; and (2.) certain personal chattels are protected from distress either absolutely or conditionally. CHAP. I. § 1.

By the 11 Geo. II. c. 19, s. 8, an exception to this rule is created in the case of growing crops, the words being, "All sorts of corn and grass, hops, roots, fruits, pulse, or other product whatsoever which shall be growing, &c., and the same to cut, gather, make, cure, carry, and lay up when ripe," &c. (g). The landlord, however, is not bound to resort to growing crops to satisfy the distress before taking things conditionally privileged, such as beasts of the plough, &c. (h). What things may be distrained—
Growing crops, hay, straw, &c.

The 2 Will. & Mary, sess. 1, c. 5, s. 3, gives power to any person having rent in arrear, and due upon any demise, lease, or contract whatsoever (see sect. 2), to seize any sheaves or cocks of corn, or corn loose or in the straw, or hay lying or being in any barn or granary, or upon any hovel, stack, or rick, or otherwise upon any part of the land, &c., for or in the nature of a distress.

Under this Act and the 4 Geo. II. c. 28, s. 5, the grantee of a rent-charge may distrain hay or straw, loose or in the stack (i). But under the 11 Geo. II. c. 19, the grantee of an annuity cannot distrain growing crops, even under an express power in the deed, for that Act only applies to landlords, and not to "any person having rent in arrear" (j).

If the corn be sold before it is ripe, the sale is void (k), though not the distress. Where the defendant seized the plaintiff's growing wheat, and sold it while growing for its full value to a purchaser, who cut it, and the surplus of the

have been *levant and couchant*; nor even afterwards for rent reserved, unless the owner of the cattle, after notice, fail to remove them. *Gill v. Gawin, supra*. In *Miles v. Furber*, 42 L. J. Q. B. 41, L. R. 8 Q. B. 77, Mellor, J., suggested that cattle agisting near large towns would be privileged.

(g) Trees growing in the grounds of a nurseryman are not within the words "other product," for they

are not subject to the process of becoming ripe, &c. *Clark v. Gaskarth*, 8 Taunt. 431.

(h) *Piggott v. Birtles*, 1 M. & W. 441.

(i) *Johnson v. Faulkner*, 2 Q. B. 925.

(j) *Miller v. Green*, 2 Cr. & J. 142, 8 Bing. 92 (in error).

(k) *Owen v. Leigh*, 3 B. & A. 470. See *Proudlove v. Twemlow*, 1 Cr. & M. 326.

CHAP. I. § 1. sale, after satisfying the rent, was paid over to the plaintiff, and he sustained no damage, it was held that the plaintiff was not entitled to recover even nominal damages (*l*).

Growing corn sold under an execution could not formerly be distrained unless the purchaser allowed it to remain an unreasonable time on the ground after it was ripe (*m*). But now, by the 14 & 15 Vict. c. 25, s. 2, growing crops seized and sold by the sheriff under an execution are liable, as long as they remain on the land, to be distrained for the rent which becomes due after the seizure and sale, provided there is no other sufficient distress (*post*, p. 152).

The 56 Geo. III. c. 50, s. 1 (*n*), provides, that no sheriff or other officer in England or Wales shall, by virtue of any process of any court of law, carry off or sell, or dispose of for the purpose of being carried off from any lands let to farm, any straw threshed or unthreshed, or any straw of crops growing, or any chaff, colder, or any turnips, or any manure, compost, ashes, or seaweed, in any case whatsoever, nor any hay, grass, or grasses, whether natural or artificial, nor any tares or vetches, nor any roots or vegetables, being produce of such lands, in any case where, according to any covenant or written agreement, entered into and made for the benefit of the owner or landlord of any farm, such hay, grass, or grasses, tares and vetches, roots or vegetables, ought not to be taken off or withholden from such lands, or which, by the tenor or effect of such covenants or agreements, ought to be used or expended thereon, and of which covenants or agreements such sheriff or other officer shall have received a written notice before he shall have proceeded to sale.

By sect. 3 it is provided, that the sheriff may dispose of produce, subject to an agreement to expend it on the land (*o*).

By sect. 6, in all cases where any purchaser or purchasers of any crops or produce hereinbefore mentioned shall have

(*l*) *Rodgers v. Parker*, 18 C. B. *Brantom v. Griffiths*, 46 L. J. C. P. 112. (C. A.) 408.

(*m*) *Peacock v. Purvis*, 2 B. & B. 362; *Wright v. Dewes*, 1 A. & E. 641; *Hutt v. Morrell*, 11 A. & E. 425. (*n*) See *post*, Part 2, c. 2, Duty to Repair and Cultivate.

(*o*) It has been doubted whether this section is more than directory. See *Wright v. Dewes*, 1 Ad. & E. 644.

entered into any agreement with such sheriff or other officer, touching the use and expenditure thereof on lands let to farm, it shall not be lawful for the owner or landlord of such lands to distrain for any rent on any corn, hay, straw, or other produce thereof, which, at the time of such sale and the execution of such agreement entered into under the provisions of this Act, shall have been severed from the soil, and sold, subject to such agreement, by such sheriff or other officer; nor on any turnips, whether drawn or growing, if sold according to the provisions of this Act; nor on any horses, sheep, or other cattle, nor on any beast whatsoever, nor on any waggons, carts, or other implements of husbandry, which any person or persons shall employ, keep, or use on such lands, for the purpose of threshing out, carrying, or consuming any such corn, hay, straw, turnips, or other produce under the provisions of the Act, and the agreement or agreements directed to be entered into between the sheriff or other officer and the purchaser or purchasers of such crops and produce as hereinbefore mentioned.

When hay or straw are seized under a distress, and the tenant is under covenant to expend them upon the premises, the landlord cannot sell them at a less price, subjecting them to a condition that the purchaser shall expend them according to the covenant (*p*).

(c.) WHAT MAY NOT BE DISTRAINED.

1. Things annexed to the freehold. 2. Things of third persons on the tenant's premises. 3. Things which cannot be restored in the same plight, as sheaves of corn, &c. 4. Things in actual use.

Things absolutely privileged.

1. Whatever is part of the freehold is exempted from distress; thus kilns, furnaces, cauldrons, windows, doors, and the like, affixed to the freehold, cannot be distrained (*q*). There appear to be three reasons for this rule; first, that fixtures

(*p*) *Ridgway v. Lord Stafford*, 6 Exch. 404; *Frusher v. Lee*, 10 M. & W. 709. In *Abbey v. Petch*, 8 M. & W. 419, which was an earlier case, the contrary was decided, but this case is now overruled. See *Hawkins v. Walrond*, 45 L. J. C. P. 772, L. R. 1 C. P. D. 280.

(*q*) *Co. Litt.* 47 b; *Simpson v. Hartopp*, Willes, 515, 1 Smith's L. C., notes, p. 373; *Niblett v. Smith*, 4 T. R. 504; *Darby v. Harris*, 1 G. & D. 234; *Dalton v. Whittle*, 3 G. & D. 260; *Gorton v. Falkner*, 4 T. R. 567.

CHAP. I. § 1. are not personal chattels, but form part of the thing demised; secondly, that they cannot be taken away without damage to the freehold (*r*); and thirdly, that they would be injured by severance and removal, and could not be restored in the same condition as they were in when taken (*s*); and this is a rule still in force, subject to some statutory exceptions as to growing crops and matters of this nature (*t*). This privilege extends also to such things as would be removable as between landlord and tenant (*u*). Thus, kitchen-ranges, stoves, coppers, and grates are not distrainable, although they may be removed by the tenant during the term (*v*); and a mere temporary removal of fixtures for the purpose of repairing, &c., will not destroy the privilege (*w*).

A question has often arisen as to the degree of annexation required to bring the particular thing within the rule which excepts fixtures from distress. In *Wiltshire v. Cottrell* (*x*) it was held that a granary, resting by its mere weight upon straddles built into the land, was not a fixture within the meaning of a deed by which all the fixtures appertaining to a farm were conveyed. In *Duck v. Braddyll* (*y*) it was doubted whether machinery bolted to the floor of a factory was distrainable. Besides the test of being easily removed without injury to itself or the premises, it is also to be considered whether the annexation is for the permanent and substantial improvement of the premises, or merely for a temporary purpose (*z*).

2. Things delivered to the tenant to be wrought, worked up, or managed, or taken care of, in the way of his trade or employment, are not distrainable (*a*). So goods sent to an

(*r*) See the judgment in *Hellawell v. Eastwood*, 6 Exch. 311.

(*s*) *Termes de la Ley*, Distress, 69 a; Co. Litt. 47 a.

(*t*) *Morley v. Pincombe*, 2 Exch. 101.

(*u*) There is a distinction in this respect between a distress and an execution; for under the latter, fixtures which would be removable by the tenant as between him and his landlord, may be seized. *Poole's case*, 1 Salk. 368.

(*v*) *Darby v. Harris*, 1 Q. B. 895; *Pitt v. Shew*, 4 B. & A. 208; *Dalton v. Whitem*, 3 G. & D. 260.

(*w*) *Gorton v. Falkner*, 4 T. R. 567; Bro. Abr. tit. Distress, pl. 23;

Niblett v. Smith, 4 T. R. 504, 11 Co. B. 50.

(*x*) 1 E. & B. 674.

(*y*) *Duck v. Braddyll*, M'Clel. 217, S. C. 13 Price, 445. See also *Trap-pes v. Harter*, 2 Cr. & M. 177.

(*z*) *Hellawell v. Eastwood*, 6 Exch. 311; *Walsley v. Milne*, 7 C. B. N.S. 115. See also *Lane v. Dixon*, 3 C. B. 776; *Wood v. Hewett*, 8 Q. B. 913; *Waterfall v. Penistone*, 6 C. & B. 876. See *post*, Fixtures, Part 3, c. 7.

(*a*) 1 Inst. 47 a; *Gisbourn v. Hurst*, 1 Salk. 249; *Gilman v. Elton*, 3 B. & B. 75; *Thompson v. Mashiter*, 1 Bing. 283; *Matthias v. Mesnard*, 2 C. & P. 353, Co. Litt. 47 a; *Gibson v. Ireson*, 3 Q. B. 39.

auctioneer to be sold were held to be privileged from being distrained for his rent (*b*), and the carcass of a beast sent to a butcher to be slaughtered was also held to be privileged (*c*). A cab in the hands of an agent for the sale of carriages is privileged (*d*). Goods in possession of a pawnbroker as security for money advanced are also privileged (*e*), and so are goods deposited with a furniture warehouseman to be kept safely (*f*). Where, however, the goods are not delivered for the purpose of being wrought up, or having anything done to them, or of being kept safely, by the tenant in the way of his trade, they are not privileged, as in the case of a carriage sent in order to convey goods, or casks containing beer, &c. (*g*).

In *Muspratt v. Gregory* (*h*) it was said that the cases of exemption from distress ought not to be extended; and it seems doubtful whether a carriage actually containing privileged goods is distrainable or not (*i*).

In the case of *Parsons v. Gingell* (*j*), Wilde, C.J., in delivering judgment, said, "The case of a horse sent to a livery-stable *merely* to be cleaned and fed is very different from one where he is sent to remain during the owner's pleasure, the feeding and grooming (in the latter case) being only incident to the principal object."

Goods of third parties are also protected by statute in the case of railway companies by the 35 & 36 Vict. c. 50, which provides that rolling stock in a work (*k*) shall not be liable to distress for rent payable by a tenant of the work if it has a mark upon it sufficiently indicating the actual owner (*l*).

(*b*) *Adams v. Grane*, 1 Cr. & M. 380; *Brown v. Arundell*, 10 C. B. 54; *Williams v. Holmes*, 8 Exch. 861, but only while they remain upon his premises, *Lyons v. Elliot*, 45 L. J. Q. B. 159.

(*c*) *Brown v. Shevill*, 2 A. & E. 138.

(*d*) *Findon v. M'Laren*, 6 Q. B. 891.

(*e*) *Swire v. Leech*, 18 C. B. N.S. 479.

(*f*) *Miles v. Furber*, 42 L. J. Q. B., 41; L. R. 8 Q. B. 77.

(*g*) *Muspratt v. Gregory*, 1 M. & W. 633; *Joule v. Jackson*, 7 M. & W. 450; *Wood v. Clark*, 1 Tyrwh. 314, 1 C. & J. 484; *Fenton v. Logan*, 9 Bing. 676; *Parsons v. Gingell*, 4 C. B. 545.

(*h*) See *supra*, and see *Joule v. Jackson*, 7 M. & W. 457.

(*i*) See *Rede v. Burley*, Cro. Eliz. 596; and see the judgment of Anderson, B., in *Muspratt v. Gregory*, 1 M. & W. 646. See also *Smith L. C.* 5th edit. 376.

(*j*) *Supra*.

(*k*) Work includes any colliery, &c., in or on which is any railway siding.

(*l*) s. 3. By sect. 5 the protection does not extend to the tenant's interest (if any) in the rolling stock, and the Court has power to settle any disputes between the landlord and the parties claiming the rolling stock. As to the remedies for illegal distress, see *post*, p. 167.

CHAP. I. § 1.

So too in the case of lodgers. By the 34 & 35 Vict. c. 79, s. 1, it is provided that if any superior landlord shall levy or authorise to be levied a distress on any furniture, goods, or chattels of any lodger for arrears of rent due to such superior landlord by his immediate tenant, such lodger may serve such superior landlord, or the bailiff or other person employed by him to levy such distress, with a declaration in writing made by such lodger, setting forth that such immediate tenant has no right of property or beneficial interest in the furniture, goods, or chattels so distrained or threatened to be distrained upon, and that such furniture, goods, or chattels are the property or in the lawful possession of such lodger; and also setting forth whether any and what rent is due and for what period from such lodger to his immediate landlord; and such lodger may pay to the superior landlord, or to the bailiff or other person employed by him as aforesaid, the rent, if any, so due as last aforesaid, or so much thereof as shall discharge the claim of such superior landlord. And to such declaration shall be annexed a correct inventory, subscribed by the lodger, of the furniture, goods, and chattels referred to in the declaration; and if any lodger shall make or subscribe such declaration and inventory knowing the same or either of them to be untrue in any material particular, he shall be deemed guilty of a misdemeanour (*m*).

By sect. 3, any payment made by any lodger, pursuant to the first section of this Act, shall be deemed a valid payment on account of any rent due from him to his immediate landlord.

3. Things which cannot be restored in the same plight, as sheaves and cocks of corn, &c., are privileged (*n*); but as to sheaves and cocks of corn, &c., see now the 2 Will. & Mary, sess. 1, c. 5, s. 3, *ante*, p. 147, and the 56 Geo. III. c. 50, ss. 1, 3, 6, *ante*, p. 148. And now, with respect to growing crops taken in execution, it is enacted by the 14 & 15 Vict. c. 25, s. 2, that in case all or any part of the growing crops of the tenant of any farm or lands shall be seized and sold by any sheriff, or other officer by virtue of any writ of *fiery facias*, or other writ of execution, such crops, so long as the same shall remain on the farms or lands, shall, in default of sufficient distress of the goods and chattels of the tenant, be

(*m*) Sect. 2 provides a remedy for 61; Johnson v. Faulkner, 2 Q. B. illegal distress. See *post*, p. 170. 925.

(*n*) Wilson v. Duckett, 2 Mod.

liable to the rent which may accrue and become due to the landlord after any such seizure and sale, and to the remedies by distress for recovery of such rent, and that notwithstanding any bargain and sale or assignment which may have been made or executed of such growing crops by any such sheriff or other officer. Upon this principle it has been decided that butcher's meat cannot be distrained (o).

CHAP. I. § 1.

4. Things while in actual use are privileged from distress in order to prevent a breach of the peace (p).

Besides these classes of things, there are also two others which are privileged, viz., firstly, things in which there can be no valuable property, such as animals *feræ naturæ* (q); and secondly, goods in the custody of the law (r).

The goods of a guest at a public inn are in general not distrainable upon principles of public convenience (s).

There are some species of property conditionally privileged, provided there be other sufficient distress upon the premises (t). Of these there are three classes:—1. Beasts of the plough and instruments of husbandry (u). 2. The instruments of a man's trade or profession (v). 3. Beasts which improve the land, as sheep (w).

Things conditionally privileged.

(o) *Morley v. Pincombe*, 2 Exch. 101.

(p) *Simpson v. Hartopp*, 1 Smith's L. C. 377, 5th edit.; *Field v. Adams*, 12 A. & E. 652; *Bond v. Kennington*, 1 Q. B. 679.

(q) As to deer, see *Davies v. Powell, Willes*, 47; *Morgan v. Earl of Abergavenny*, 8 C. B. 678. As to partridges and pheasants, see *Reg. v. Shickle*, L. R. 1 C. C. R. 158, 38 L. J. M. C. 21. As to dogs, which it seems are distrainable, see 2 Bl. Com. 391; *Davies v. Powell*, *supra*, and 1 Smith's L. C. 378, 5th edit.

(r) Such as property taken damage feasant, or in execution. See 1 Inst. 47 a; *Eaton v. Southby, Willes*, 131; *Peacock v. Purvis*, 2 B. & B. 362; *Wright v. Dewes*, 1 A. & E. 641; *Wharton v. Naylor*, 12 Q. B. 673. But as to the landlord's right where goods are taken in execution, see 8 Anne, c. 14, s. 1; 7 & 8 Vict. c. 96, s. 67; 19 & 20 Vict. c. 108, s. 75; *Cox v. Leigh*, 43 L. J. Q. B. 123; *L. R. 9 Q. B. 333*.

(s) *Robinson v. Walter*, 3 Bulst.

269. But see *Francis v. Wyatt*, 3 Burr. 1499; *Adams v. Grane*, 1 C. & M. 381; *Bayley, J.*; *Brown v. Shevil*, 4 N. & M. 283; *Paterson, J.*; *Crozier v. Tomlinson, Barnes*, 472, cited in 3 Burr. 1500; *Muspratt v. Gregory*, 3 M. & W. 681, Lord Denman, C. J.

(t) Co. Litt. 47 a; *Fenton v. Logan*, 9 Bing. 676; *Gorton v. Falkner*, 4 T. R. 565. It should be observed that even if there is a sufficient distress without resorting to things privileged *sub modo*, yet if that distress consists of growing crops, which are only distrainable by statute, and are not immediately productive, the landlord may distrain the things privileged *sub modo*. *Piggott v. Birtles*, 1 M. & W. 441.

(u) Colts, steers, and heifers, do not fall within this class, as they do not gain the land. *Keen v. Priest*, 4 H. & N. 236.

(v) *Nargett v. Nias*, 1 E. & E. 439; *Gorton v. Falkner*, *supra*; *Fenton v. Logan*, *supra*.

(w) *Keen v. Priest*, *supra*.

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(d.) WHERE THE DISTRESS MAY BE MADE.

Where the
distress may be
made.

The distress can only be made on some part of the demised premises out of which the rent issues (x), except in the case of the Crown, and except in the case of fraudulent removals to prevent a distress, as to which see *infra*; so that if the landlord go to distrain cattle, and they escape out of the lands demised, or into any highway within his view, he cannot pursue them (y), neither can he if they be driven off the lands in his sight for any lawful purpose (z); but where they are driven off in the view of the landlord, for the express purpose of avoiding the distress, the landlord may make fresh pursuit, and seize them in the highway, or in any other place off the lands demised (a). But at common law, if before the landlord had view of the cattle, they were driven off the lands, even for the express purpose of avoiding a distress, the landlord could not pursue or follow them (b). By the 11 Geo. II. c. 19, s. 1, however, if the tenant fraudulently or clandestinely (c) remove his goods from the demised premises, in order to prevent a distress, the landlord is within thirty days allowed to follow and distrain them, wherever they may be found, provided they have not been previously sold for valuable consideration to a *bona fide* purchaser. To entitle the landlord to pursue the goods of the tenant under this statute, it was held by Eyre, C.J., that the removal must have taken place after the rent actually became due, and was in arrear (d). And although in a subsequent case, where the goods had been removed from the premises the night before the rent became due, Lord Ellenborough, C.J., declared (e) that upon this point he entertained some considerable doubts, and, but that the case before him turned upon another point, would have reserved it for the opinion of the Court; yet the law, as laid down by Chief-Justice Eyre, has

(x) 1 Rol. Abr. 671, l. 37; Co. Litt. 161 a; Gilb. Distress, 40; Capel v. Buszard, 6 Bing. 150; Com. Dig. Distress (A) 3, (B) 1; Rogers v. Birkmire, 2 Strange, 1040. The statute of Marlebridge (52 Hen. III. c. 15) confirmed the common law in this respect. See 2 Inst. 131, and Gilb. Dist. 40. It seems sufficient if the distress be made not absolutely on the premises, although practically so. Gillingham v. Gwyne, 16 L. T. N.S. 640, Lush., J.; Hodges v. Lawrence, 18 Just. Peace, 347 Ex.

(y) Co. Litt. 161 a; 2 Inst. 131.

(z) Ibid. 1 Rol. Abr. 671, l. 45.

(a) Ibid.

(b) Co. Litt. 161 a.

(c) Watson v. Main, 3 Esp. 15; Opperman v. Smith, 4 D. & R. 33. The landlord must show that the goods were removed to elude the distress. Parry v. Duncan, 7 Bing. 243.

(d) Watson v. Main, 3 Esp. 15.

(e) Furneaux v. Fotherby, 4 Camp. 136.

since been recognised and confirmed on argument by the Court of Common Pleas (*f*). CHAP. I. § 1.

The statute applies to the goods of the tenant only (*g*). By sect. 4, an additional (*h*) remedy is given to the landlord by complaint to two justices, where the goods do not exceed the value of £50.

By sect. 7 of the 11 Geo. II. c. 19, when goods are fraudulently removed, and placed in any house or place locked up or otherwise secured, the landlord or his agent may, with the assistance of a peace-officer (and in the case of a dwelling-house, after oath being made before a magistrate of a reasonable ground to suspect that the goods are in it), break open the house, &c., in the day-time, and distrain the goods as if they had been in any open place.

By the 8th sect. of the same statute, 11 Geo. II. c. 19, the landlord may distrain cattle (of the tenants) depasturing upon any common or way appertaining to the premises demised, a privilege too reasonable to require comment. The language of this section is, that the landlords or their agents may "take and seize, as a distress for arrears of rent, any cattle or stock of their respective tenant or tenants, feeding or depasturing upon any common appendant or appurtenant, or any way belonging, to all or any part of the premises demised or holden."

(e.) WHEN THE DISTRESS MAY BE MADE.

As rent is not in arrear till the last minute of the day on which it becomes payable has elapsed, the landlord cannot distrain until the day after it becomes due (*i*), except by express agreement (*j*). Nor can he distrain in the night-time, *i.e.*, from sunset to sunrise (*k*). When the distress may be made.

At common law a landlord could not have distrained for rent after the determination of the tenancy (*l*). But by

(*f*) *Rand v. Vaughan*, 1 Bing. N.C. 767. (*j*) *Buckley v. Taylor*, 2 T. R. 600; *Giles v. Spencer*, 3 C. B. N.S. 244, 26 L. J. C. P. 237.

(*g*) *Thornton v. Adams*, 5 M. & S. 38; *Portman v. Harrell*, 6 C. & P. 225. (*k*) Co. Litt. 142 a; *Aldenburgh v. Peaple*, 6 C. & P. 212; *Tutton v. Darke*, 5 H. & N. 647; *Nixon v. Freeman*, 5 H. & N. 647; *Keen v. Priest*, 4 H. & N. 240, *per Watson*, B.

(*h*) *Bromley v. Holden*, 1 Moo. & M. 175. On the construction of this section, see *Stanley v. Wharton*, 9 Price 301, 10 Id. 138; *Coster v. Wilson*, 3 M. & W. 411. (*l*) *Pennant's case*, 3 Co. Rep. 64; *Williams v. Stiven*, 9 Q. B. 14.

(*i*) *Duppa v. Mayo*, 1 Saund. 287.

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8 Anne, c. 14, ss. 6, 7, "Any person or persons having any rent in arrear or due upon any lease for life or lives, or for years, or at will, ended or determined, may distrain for such arrears after the determination of the said respective leases, in the same manner as they might have done if such lease or leases had not been ended or determined; provided that such distress be made within the space of six calendar months after the determination of such lease, and during the continuance of such landlord's title or interest (*m*), and during the possession of the tenant (*n*) from whom such arrears became due (*o*).

Where a landlord intends to rely on a forfeiture, he should not distrain under or by virtue of this Act, for such distress may operate as a waiver of the forfeiture (*p*).

The distress must be made within six years from the time when the rent becomes payable; for by 3 & 4 Will. c. 27, s. 42, no arrears of rent, or any damages in respect of such arrears, shall be recovered by any distress, action, or suit, but within six years next after the same respectively shall have become due, or next after an acknowledgment of the same in writing shall have been given to the person entitled thereto, or his agent, signed by the person to whom the same was payable, or his agent. Under this statute the landlord can distrain for the last six years' rent, so long as he has a reversion, but when his right to the land is at an end, as there is no longer any tenancy or any reversion, his right to distrain likewise ceases (*q*).

By sect. 2 of this Act it is provided, that no person shall make an entry or distress, or bring an action to recover any land or rent, but within twenty years next after the right of entry, distress, or action has first accrued. But this section

(*m*) *Burne v. Richardson*, 4 Taunt. 720.

(*n*) *Taylorson v. Peters*, 7 A. & E. 110; *Doe d. David v. Williams*, 7 C. & P. 322; *Nuttall v. Staunton*, 4 B. & C. 51; *Braithwaite v. Cooksey*, 1 H. Bl. 465; *Turner v. Barnes*, 2 B. & S. 435, 31 L. J. Q. B. 170. But as to possession continued beyond the expiration of the term under a custom of the country, see *Beavan v. Delahay*, 1 H. Bl. 5; *Griffiths v. Puleston*, 13 M. & W. 358.

(*o*) Before this statute it was not unusual, and may still be expedient, to insert in leases a provision that the last half year's rent shall be paid on some day prior to the determination of the lease, so as to enable the landlord to distrain before the removal of the tenant. See Co. Litt. 47 b.

(*p*) *Ward v. Day*, 4 B. & S. 337, 33 L. J. Q. B. 254.

(*q*) See 3 & 4 Will. IV. c. 27, ss. 2, 3, 8.

has been held not to apply to rents reserved on a demise, but to be confined to rents existing as an inheritance distinct from the land, and for which before this Act the party entitled to them might have had an assize. The only way, therefore, in which it can affect the right of making a distress is by its operation in destroying the right to recover the land itself after the period of limitation which it mentions (*r*).

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Generally speaking a second distress cannot lawfully be made where the first has been abandoned, nor can it be divided and taken part at one time and part at another (*s*), if there is a fair opportunity for making the distress in the first instance. But where the tenant by his own misconduct prevents the first distress, or where a mistake has arisen with respect to the value of the goods seized (*t*), then a second distress would be lawful (*u*).

Abandonment;
second distress.

By the 17th Car. II. c. 7, s. 4, it is provided, that "in all cases (aforesaid) where the value of the cattle distrained as aforesaid shall not be found to be to the value of the arrears distrained for, the party to whom such arrears were due, his executors and administrators, may from time to time distrain again for the residue of the said arrears."

Although there can in general be no second distress, yet where there has been no abandonment, there may be a continuance of a distress, and then even an outer-door may be broken open (*v*). It is a question for the jury whether there has been an abandonment or not (*w*).

(f.) HOW A DISTRESS SHOULD BE MADE.

A distress for rent is made by the landlord or his agent entering upon some part of the demised premises (*x*) and

How a distress
should be made.

(*r*) See *Paget v. Foley*, 2 Bing. N. C. 679; *Grant v. Ellis*, 9 M. & W. 113; *Doe d. Angell v. Angell*, 9 Q. B. 328; *The Dean of Ely v. Chah*, 15 M. & W. 617; *Owen v. De Beauvoir*, 16 M. & W. 547, S. C. 5 Exch. 166. And see the notes to *Nepean v. Doe*, 2 Smith's L. C. 577, 5th edit.; and see 3 Chit. St. tit. Limitation of Actions, pp. 25-62.

(*s*) Com. Dig. Distress (A) 1; *Bagge v. applt. Mawby*, respondt., 8 Ex. 641; *Gambull v. Earl of Falmouth*, 4 A. & E. 73; *Lear v. Caldecott*, 4 Q. B. 123; *Owens v. Wynne*, 4 E. & B. 579; *Smith v. Goodwin*, 4 B. & Ad. 413; *Dawson v. Cropp*, 1 C. B. 961; *Nash v. Lucas*, L. R. 2 Q. B. 590.

(*t*) *Hutchins v. Chambers*, 1 Burr. 579, 1 Wms. Saund. 201, n (1).

(*u*) *Lee v. Cooke*, 2 H. & N. 584, 3 H. & N. 203; *Woolaston, applt. v. Stafford*, respondt., 15 C. B. 278.

(*v*) *Bannister v. Hyde*, 2 E. & E. 627, 29 L. J. Q. B. 141; *Eldridge v. Stacey*, 15 C. B. N.S. 458.

(*w*) *Eldridge v. Stacey*, *supra*. See also *Russell v. Rider*, 6 C. & P. 416; *Kerby v. Harding*, 6 Exch. 234.

(*x*) As to fraudulent removals, see *supra*, p. 154.

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seizing some portions of the goods there in the name of the whole, or of so much as may be necessary to satisfy the rent (*y*); but a very slight act amounts, in contemplation of law, to such a seizure, if the intention of the party distraining is manifest. Thus walking round the premises, making an inventory of the articles there, and declaring that they were seized as a distress for the rent due, or merely saying, "These things shall not be removed until the rent is paid," has been held to amount to a distress, although no seizure was made (*z*).

The breaking open of an outer-door, window, gate, enclosure, or the unfastening of a hasp, will render the distress illegal and void *ab initio* (*a*). So, in order to make an entry for distress, the landlord or his agent may not put his hand through a hole in a door or through a broken pane of glass and remove a bar, window-latch, or other fastening where such a mode of entering is not the usual mode (*b*). But if the outer-door be open, an inner-door or lock may be forced open in order to find distrainable goods (*c*). So the party distraining may climb over a fence to gain access to the house by an open door (*d*), and may open an outer-door which is fastened to keep the door shut, and not to keep people out, if he use the ordinary means, as lifting the latch, withdrawing a bolt, or turning a key; or he may enter through an open window (*e*). Where a room occupied by the landlord was over a mill demised to the tenant, and there being no ceiling the landlord entered through the floor by raising the boards, it was held a lawful entry (*f*). Where a distress has been lawfully begun, but there is an interruption not amounting to an abandonment, an outer-door may be broken open in order to continue the distress (*g*). So also in order to get

(*y*) *Dodd v. Morgan*, 6 Mod. 215; *Draper v. Thompson*, 4 C. & P. 84, Bullen, 131.

(*z*) *Wood v. Nunn*, 5 Bing. 10; *Swan v. Earl of Falmouth*, 8 B. & C. 456; *Hutchins v. Scott*, 2 M. & W. 809; *Cramer v. Mott*, L. R. 5 Q. B. 357, 39 L. J. Q. B. 172.

(*a*) *Lemayue's case*, 5 Co. R.; *Duke of Brunswick v. Slowman*, 8 C. B. 317; *Brown v. Glenn*, 16 Q. B. 254, 9 Vin. Abr. 128, Distress (E) 2, pl. 6, Co. Litt. 161 a; *Attack v. Bramwell*, 3 B. & S. 520, 32 L. J. Q. B. 146; *Hancock v. Austin*, 14 C. B. N.S. 634, 32 L. J. C. P. 252; *Nash v. Lucna*, L. R. 2 Q. B. 590, 8 B. & S. 531.

(*b*) *Fitz. Abr. tit. Distress*, pl. 21; *Hancock v. Austin*, 14 C. B. N.S. 634, 32 L. J. C. P. 252. See *Ryan v. Shilcock*, 7 Exch. 72, 21 L. J. Ex. 55.

(*c*) *Browning v. Dann*, Bull. N. P. 81, Co. Litt. 161 a.

(*d*) *Eldridge v. Stacey*, 15 C. B. N.S. 458.

(*e*) *Ryan v. Shilcock*, 7 Exch. 72, 21, L. J. Ex. 55; *Nixon v. Freeman*, 5 H. & N. 647, 653.

(*f*) *Gould v. Bradstock*, 4 Taunt. 562.

(*g*) See *Bannister v. Hyde*, *supra*, p. 157.

out and remove the distress (*h*). Where it is necessary, a police officer may be called in (*i*). CHAP. I. § 1.

In order that the tenant may know what goods the landlord intends to distrain, the party distraining must make an inventory of as many goods as are sufficient to cover the rent distrained for, and the expenses of the distress and the inventory should not be vague and uncertain (*j*).

Notice of the distress, and of the time when the goods will be appraised and sold unless replevied or the rent or charges satisfied, should be given; and it is convenient to write such notice at the bottom of the inventory (*k*). It must be served with a true copy of the inventory on the tenant, or left at the house or other most notorious place charged with the rent (*l*). The place to which the goods are removed must be mentioned in the notice (*m*). The notice, unless personal, must be in writing (*n*). It must not be vague and uncertain as to the goods distrained (*o*). Want of notice does not render the distress illegal, but makes it irregular to proceed to sell (*p*). The notice need not state when the rent became due, nor the amount (*q*), but it must not state an amount greater than the rent actually due (*r*). Any defect in the notice is generally immaterial, for a man may distrain for one cause and avow or justify for another (*s*).

It frequently happens that when a distress is commenced, the tenant makes a tender of the rent in arrear. The common law rule upon this subject is thus laid down by Lord Coke, in the Six Carpenters' case (*t*):—"Tender upon the land, before the distress, makes the distress tortious; tender after the distress, and before the impounding, makes the detainer, and not the taking, wrongful. Tender after the

(*h*) *Pugh v. Griffiths*, 7 A. & E. 827. Lucas v. Tarleton, 3 H. & N. 116;
 (*i*) *Skidmore v. Booth*, 6 C. & P. 777. Wilson v. Nightingale, *supra*; Robinson v. Waddington, 13 Q. B. 753.
 (*j*) See *Wakeman v. Lindsay*, 14 Q. B. 625. (*q*) *Moss v. Gallimore*, 1 Doug. 279, 1 Smith's L. C. 5th edit. 542;
 (*k*) *Lyon v. Tomkies*, 1 M. & W. 606, 2 W. & M. sess. 1, c. 5, s. 2. Tancred v. Leyland, 16 Q. B. 669.
 (*l*) 2 W. & M. c. 5, s. 2. (*r*) See *Taylor v. Henniker*, *post*, p. 168.
 (*m*) 11 Geo. II. c. 19, s. 9. (*s*) *Crowther v. Ramsbottom*, 7 T. R. 654; *Etherton v. Popplewell*, 1 East. 139; *Wootley v. Gregory*, 2 J. & J. 536; *Trent v. Hunt*, 9 Exch. 14, 22 Exch. 318; *Phillips v. Whitsea*, 2 E. & E. 804, 29 L. J. Q. B. 164.
 (*n*) *Wilson v. Nightingale*, 8 Q. B. 1034; *Walter v. Rumball*, 1 Lord Raymond, 53. (*t*) 8 Rep. 146.
 (*o*) *Kerby v. Harding*, 6 Exch. 234, 20 L. J. Ex. 163; *Wakeman v. Lindsay*, 14 Q. B. 625.
 (*p*) *Trent v. Hunt*, 9 Exch. 14;

CHAP. I. § 1. impounding makes neither the one nor the other wrongful, for then it comes too late, because then the case is put to the trial of the law to be there determined."

If, however, the tender is made within the five days allowed by the statute (*u*) for the tenant to replevy, an action may be maintained against the landlord, if he proceed to sell the distress, although the goods were impounded before tender (*v*). A tender of the rent without expenses after a warrant of distress has been delivered to the broker, is a good tender (*w*). Whether the distress be "impounded" before the tender or not, is a question depending on the circumstances of the case (*x*). A tender may be made to the landlord himself, even where he has placed the matter in his broker's hands (*y*). So it may be made to any agent of the landlord having authority to receive the rent (*z*). But a tender to a man who is merely in possession is bad (*a*). The tenant must tender the full amount of the rent due, except actual or constructive payments on account of rent (*b*). He must also tender a sufficient sum for the lawful expenses of the distress (*c*). The tender must be made unconditionally (*d*).

(g.) WHAT TO BE DONE WITH IT.

What to be
done with it.

As soon as the distress (*e*) is made, the landlord or his agent must impound the goods in a pound (*f*) suitable to the nature of the distress. Thus, if the articles distrained are of a perishable nature, the landlord should secure them in a

- (*u*) 2 W. & M. sess. 1, c. 5, s. 2. & E. 269, 29 L. J. Q. B. 11; Pilkington v. Hootings, Cro. Eliz. 813.
 (*v*) Johnson v. Upham, 2 E. & E. 250, 28 L. J. Q. B. 252, overruling Ellis v. Taylor, 8 M. & W. 415. See Fell v. Whitaker, 41 L. J. Q. B. 78.
 (*w*) Bennett v. Bayes, 5 H. & N. 391.
 (*x*) Thomas v. Harries, 1 M. & G. 695; Swan v. Earl of Falmouth, 8 B. & C. 456; Tennant v. Field, 8 E. & Bl. 336; Brown v. Powell, 4 Bing. 230; Peppercorn v. Hoffman, 9 M. & W. 618.
 (*y*) Smith v. Goodwin, 4 B. & Ad. 413.
 (*z*) Bennett v. Bayes, 5 H. & N. 391, 29 L. J. Ex. 224; Hatch v. Hale, 15 Q. B. 10; Brown v. Powell, 4 Bing. 230.
 (*a*) Boulton v. Reynolds, 2 E. & E. 269, 29 L. J. Q. B. 11; Pilkington v. Hootings, Cro. Eliz. 813.
 (*b*) See *ante*, Deductions, p. 125.
 (*c*) See *infra*, p. 165.
 (*d*) Finch v. Miller, 5 C. B. 428; Bowen v. Owen, 11 Q. B. 130; Bull v. Parker, 2 Dow N.S. 345; Manning v. Lunn, 2 C. & K. 18; Jennings v. Major, 8 C. & P. 61; Foord v. Noll, 2 Dow. N.S. 617; Laing v. Meandor, 1 C. & P. 257.
 (*e*) At common law the distress was only a pledge for the rent in arrear, and the landlord was entitled to keep it as a security until his rent was satisfied. If he sold it, he became a trespasser *ab initio*, and the proceedings were void. See Six Carpenters' case, 1 Smith's L. C. 132; Gilbert on Distress, 67.
 (*f*) Co. Litt. 47 b.

pound *covert* or weather-proof; if they are cattle, in an open pound (*g*). At common law, if the distrainer put the cattle distrained into a *public* pound, they lay there at the tenant's risk, and if they starved, the distrainer was not answerable (*h*). CHAP. I. § 1.

By 12 & 13 Vict. c. 92, s. 5, "Every person who shall impound or confine, or cause to be impounded or confined, in any pound or receptacle of the like nature any animal, shall provide and supply, during such confinement, a sufficient quantity of fit and wholesome food and water to such animal; and every such person who shall refuse or neglect to provide and supply such animal with such food and water as aforesaid, shall, for every such offence, forfeit and pay a penalty of twenty shillings."

By sect. 6, "In case any animal shall at any time be impounded or confined as aforesaid, and shall continue confined without fit and sufficient food and water for more than twelve successive hours, it shall and may be lawful to and for any person whomsoever, from time to time, and as often as shall be necessary, to enter into and upon any pound or other receptacle of the like nature, in which any such animal shall be so confined, and to supply such animal with fit and sufficient food and water during so long a time as such animal shall remain and continue confined as aforesaid, without being liable to any action of trespass, or any other proceeding by any person whomsoever, for or by reason of such entry for the purposes aforesaid; and the reasonable cost of such food and water shall be paid by the owner of such animal, before such animal is removed, to the person who shall supply the same, and the said cost may be recovered in like manner as herein provided for the recovery of penalties under this Act," *i.e.*, by summary proceedings before a justice.

By 17 & 18 Vict. c. 60, s. 1, "Every person who, since the passing of the said Act of the 12th and 13th years of Her Majesty, has impounded or confined, or hereafter shall impound or confine, as in the said Act mentioned, any animal, and has provided and supplied, or shall hereafter provide and supply, such animal with food and water as therein mentioned, shall and may, and he is hereby authorised, to recover of and from the owner or owners of such animal, not exceeding double the value of the food and water so already

(*g*) See *Wilder v. Speer*, 8 A. & E. tress (D); *Bignell v. Clark*, 5 H. & 547; *Gilbert on Dist.* 62, 2 Inst. N. 485.
106, Co. Litt. 37 b, Bac. Abr. Dis- (*h*) Bac. Abr. Distress (D).

CHAP. I. § 1. or hereafter to be supplied to such animal, in like manner as is by the said last-mentioned Act provided for the recovery of penalties under the same Act; and every person who has supplied or shall hereafter supply such food and water, shall be at liberty, if he shall so think fit, instead of proceeding for the recovery of the value thereof as last aforesaid, after the expiration of seven clear days from the time of impounding the same, to sell any such animal openly at any public market (after having given three days' public printed notice thereof), for the most money that can be got for the same, and to apply the produce in discharge of the value of such food and water so supplied as aforesaid, and the expense of and attending such sale, rendering the overplus (if any) to the owner of such animal" (i).

When the distress is taken, the distrainer cannot use or work it, except it seems where the user is necessary for its preservation; and if any injury happens to the distress from any act of the distrainer, who is responsible for the state of the pound, he must answer for it to the tenant (j).

At common law a distress could be impounded by removing it from the place at which it was taken and placing it in a common pound anywhere under the custody of the pound-keeper (k). But the 52 Hen. III. (statute of Marlebridge), c. 4, prohibited the person distraining from driving the distress out of the county. The 1 & 2 Philip and Mary, c. 12, directed that no distress of cattle should be driven out of the hundred, rape, wapentake, or lathe where it was taken, except to an open pound in the same shire not above three miles from the place of taking it. By the 11 Geo. II. c. 19, s. 10, it was enacted, "That it shall be lawful for any person or persons lawfully taking any distress for any kind of rent, to impound or otherwise secure the distress so made, of what nature or kind soever it may be, in such place, or on such part of the premises chargeable with the rent, as shall be most fit and convenient for the impounding and securing such distress."

The goods seized should, if convenient, be put into one

(i) See *Mason v. Newland*, 7 O. Chamberlayn's case, 1 Leon. 220, & P. 575; *Layton v. Hurry*, 8 Q. B. 673, 1. 26, 32; *Smith v. Wright*, 6 B. & C. 111.

(j) *Wilder v. Speer*, 8 A. & E. 547; *Vaspar v. Edwards*, 1 Salk. 248; *Dodd v. Morgan*, 6 Mod. 216; *Duncomb v. Keeve*, Cro. Eliz. 783; *H. & N. 821*.
(k) *Thomas v. Harries*, 1 M. & Gr. 707, n. (a).

room, unless the consent of the owner is given to the contrary, and very slight evidence is necessary to prove such consent (*l*).

By 2 Will. & Mary, sess. 1, c. 5, s. 2, "Where any goods or chattels shall be distrained for any rent reserved and due upon any demise, lease, or contract whatsoever, and the tenant or owner of the goods so distrained shall not, within five days next after such distress taken, and notice thereof (with the cause of such taking) left at the chief mansion-house, or other most notorious place on the premises charged with the rent distrained for, replevy the same, with sufficient security to be given to the sheriff according to law, then in such case, after such distress and notice as aforesaid, and expiration of the said five days, the person distraining shall and may, with the sheriff or under-sheriff of the county, or with the constable of the hundred, parish, or place where such distress shall be taken (who are hereby required in aiding and assisting therein), cause the goods and chattels so distrained to be appraised by two sworn appraisers (whom such sheriff, under-sheriff, or constable are hereby empowered to swear) to appraise the same truly according to the best of their understandings; and after such appraisement, shall and may lawfully sell the goods and chattels so distrained for the best price that can be gotten for the same, towards satisfaction of the rent for which the said goods and chattels shall be distrained, and of the charges of such distress, appraisement, and sale, leaving the overplus (if any) in the hands of the said sheriff, under-sheriff, or constable, for the owner's use."

Although it is in most cases optional with the party distraining to impound the distress either on or off the premises, yet where sheaves or cocks of corn, or corn loose in the straw, or hay lying in a barn or granary, or on a hovel, stack, or rick, or otherwise, are distrained under the statute 2 Will. & Mary, sess. 1, c. 5, a removal from the premises where seized is prohibited. Growing crops seized under 11 Geo. II. c. 19, ss. 8 and 9, can only be removed when they have become ripe and are cut, and there is no barn or proper place on the premises wherein they may be placed (*m*).

The distress being considered merely as a pledge, could not at common law have been sold.

(*l*) Washbourn v. Black, 11 East. 405 n; Cox v. Painter, 7 O. & P. 448.
767; Woods v. Durant, 16 M. & W. 149.
(*m*) Piggott v. Birtles, 1 M. & W.

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The notice having been given, and the five days having expired, the landlord may proceed with the appraisalment and sale, except in the case of growing crops, which are not appraiseable until after they are ripe and severed (*n*). The five days mentioned in the statute are exclusive of the day of taking and notice, and also of the day of sale (*o*). But the landlord has a reasonable time after the expiration of the five days for the purpose of appraising and selling (*p*). During such reasonable time the goods distrained are in *custodia legis*, and are protected from seizure under an execution (*q*). It is usual, however, for the tenant to consent that the landlord should remain beyond the five days. If such consent is given, it is prudent to have it writing.

The two appraisers (*r*), who must be persons having no interest, and should not be the broker or party distraining (*s*), should then be sworn by the sheriff or under-sheriff of the county, or constable of the parish where it is taken (*t*) before the appraisalment is made. The constable should be present when the appraisalment is made; he usually indorses a memorandum of the administration of the oath and attendance upon the inventory. Such memorandum does not require a stamp (*u*). The appraisers must not be sworn by the constable of an adjoining parish, although the proper constable cannot be found (*v*). But if the tenant, to save expense, dispenses with the formalities required by the statute, he will be estopped from insisting on an irregularity occasioned at his own instance (*w*).

For stamp upon appraisalment, see the Stamp Act, 1870, 33 & 34 Vict. c. 97, s. 38, and the schedule. /

(*n*) 11 Geo. II. c. 19, s. 8; Owen v. Legh, 3 B. & A. 470. See *supra*.

(*o*) Robinson v. Waddington, 13 Q. B. 753; Harper v. Taswell, 6 C. & P. 166. In Lucas v. Tarleton, 3 H. & N. 116, it was held, in action for selling the goods within the five days that plaintiff was not entitled to a verdict unless he had sustained actual damage. See also Rodgers v. Parker, 18 C. B. 112.

(*p*) Pitt v. Shew, 4 B. & A. 208; Griffin v. Scott, 2 Ld. Raymond, 1424; Winterbourne v. Morgan, 11 East. 395. 2 Camp. 117 n; Etherton v. Poppleton, 1 East. 139; Harrison v. Barry, 7 Price, 690; Fisher v. Algar, 2 C. & P. 274.

(*q*) Bac. Abr. Execution (C) 4; Harrison v. Barry, 7 Price, 690.

(*r*) Even where the rent does not exceed £20 there must be two. See 57 Geo. III. c. 93; Allen v. Flicker, 10 A. & E. 640; Bishop v. Bryant, 6 C. & P. 484.

(*s*) Andrews v. Russell, Bull. N. P. 81; Lyon v. Weldon, 2 Bing. 334; Westwood v. Cowne, 1 Strange, 172.

(*t*) Avennell v. Crocker, Moo. & M. 172.

(*u*) See Dunn v. Lowe, 4 Bing. 193.

(*v*) Kenney v. May, 1 M. & Rob. 56; Wallace v. King, 1 H. Bl. 13.

(*w*) Bishop v. Bryant, 6 C. & P. 448.

The goods having been appraised, must be sold for the best price that can be got for them, unless they have been replevied, or the rent and the charges have been paid. Where the goods are sold at their appraised value, the law will intend that they have been sold at the best price (*x*). It is not unusual for the appraisers to buy them at their own valuation, but the landlord cannot sell the goods to himself even at their appraised value (*y*). The produce of the sale must be applied in satisfaction of the rent and the expenses of the distress, and if the produce is more than sufficient for that purpose, the overplus must be left in the hands of the sheriff (*z*).

There is no statutory regulation as to the costs of a distress for rent above £20, except the 1 & 2 Philip & Mary, c. 12, which fixes a sum of fourpence for impounding a distress; but this statute has been held not to extend to cases where goods are impounded on the premises under the 11 Geo. II. c. 19 (*a*). The charges must, however, be reasonable (*b*); the general practice appears to be to charge one or two guineas for the levy, and three shillings and sixpence *per diem* for the man in possession. Where the sum distrained for does not exceed £20, the costs (*c*) are regulated by the 57 Geo. III. c. 93, whereby it is enacted, "That no person whatsoever making any distress for rent, where the sum demanded and due shall not exceed the sum of £20 for and in respect of such rent, nor any person whatsoever employed in any manner in making such distress, or doing any act whatsoever in the course of such distress, or for carrying the same into effect, shall have, take, or receive out of the produce of the goods and chattels distrained upon and sold, or from the tenant distrained on, or from the landlord, or from any other person whatsoever, any other or more costs and charges for and in respect of such distress, or any matter or thing

(*x*) *Walter v. Rumball*, 1 Ld. Raymond, 53; *Poiter v. Buckley*, 5 C. & P. 512.

(*y*) *King v. England*, 4 B. & S. 782; 33 L. J. Q. B. 145.

(*z*) See *infra*, p. 166.

(*a*) *Child v. Chamberlain*, 5 B. & Ad. 1049.

(*b*) *Lyon v. Tomkies*, 1 M. & W. 603; *Hills v. Street*, 5 Bing. 37.

(*c*) The schedule of expenses at the end of the statute is as follows:—

Appraisement, whether by one broker or more, sixpence in the pound on the value of the goods. Stamp, the lawful amount thereof. See Stamp Act, 1870 (33 & 34 Vict. c. 97-99).

All expenses of advertisement (if any such) 0 10 0 Catalogues, sale, and commission, and delivery of goods, one shilling in the pound on the net produce of the sale.

Levying distress £0 3 0
Man in possession per day 0 2 6

CHAP. I. § 1. done therein, than such as are fixed and set forth in the schedule hereunto annexed, and appropriated to each act which shall have been done in course of such distress; and no person or persons whatsoever shall make any charge whatsoever for any act, matter, or thing mentioned in the said schedule, unless such act shall have been really done."

By sect. 2 a party aggrieved by a distress may apply to justices for redress, who may order treble the amount of moneys unlawfully taken to be paid to the party complaining, together with full costs. The words of the section are, "If any person, &c., shall take, &c., any other or greater costs or charges than are set down in the schedule, or make any charge whatsoever for any act, matter, or thing mentioned in the schedule and not really done;" and it was held that these words did not apply to the case of a person *bond fide* thinking that he ought to have an appraisement, and other matters of detail, and charging for them, although such charges were not strictly lawful (*d*).

There is in sect. 6 of the above statute an enactment applicable to every distress, whether the sum distrained for be above or under £20. It is, "That every broker or other person who shall make and levy any distress whatsoever, shall give a copy of his charges, and of all the costs and charges of any distress whatsoever, signed by him, to the person or persons on whose goods and chattels any distress shall be levied, although the amount of rent demanded shall exceed the sum of £20." A landlord who does not personally interfere in the distress is not liable for the neglect of the broker employed by him to make a distress in not delivering a copy of the charges required by the statute (*e*).

A bailiff has no right to go on with a distress and sale for his expenses after his authority has been withdrawn by the landlord (*f*).

After appraisement and sale, the landlord is, under the 2 Will. & Mary, sess. 1, c. 5, s. 2, to leave "the overplus (*g*) (if any) in the hands of the said sheriff, under-sheriff, or constable, for the owner's use." If he does not do so, and actual

(*d*) *Nott v. Bound*, L. R. 1 Q. B. 405.

(*e*) *Hart v. Leach*, 1 M. & W. 560.

(*f*) *Harding v. Hall*, 14 W. R. 646, 14 L. T. N.S. 410.

(*g*) After payment of rent and reasonable expenses of distress. *Lyon v. Tomkies*, 1 M. & W. 603.

damage ensues, a special action on the case is maintain- (CHAP. I. § 1.
able (k). The proper course is to leave the overplus money
with the sheriff, &c., and to return the surplus goods to the
premises from whence they were taken (i).

(h.) ILLEGAL DISTRESS.

A distress is said to be wrongful when no rent is due at Remedies for
the time, or not so much rent as is distrained for, or where illegal distress.
an excessive distress is taken, or where goods are distrained
which are not by law the subject of a distress. It is said to
be irregular where, although the distress itself is legal, some
of the proceedings thereon are not in conformity with the
statutes by which they are regulated.

At common law any irregularity committed in the course
of a distress rendered the party distraining a trespasser *ab*
initio (j). But by 11 Geo. II. c. 19, s. 19, "When any dis-
tress shall be made for any rent justly due, and any irregu-
larity or unlawful act shall be afterwards done by the party
distraining or his agent, the distress shall not be deemed
unlawful, nor the distrainer a trespasser *ab initio*, but the
party grieved may recover satisfaction in an action of trespass
on the case."

This statute does not apply to the case of a distress unlaw-
fully made, as where a landlord, in distraining, breaks an
outer-door (k).

The nature of the irregularity formerly determined the form
of action. If the irregularity was in the nature of an act of
trespass, the landlord must have brought trespass; and if it
was in itself the subject-matter of an action on the case,
he must have brought case (l).

At common law if a landlord distrained for rent where no rent was due, the tenant's remedy was by action of trespass. When no rent
is due at the
time.

(h) *Rodgers v. Parker*, 18 C. B. 112; *Lyon v. Tomkies*, 1 M. & W. 603; *Yates v. Eastwood*, 6 Exch. 805. See *Evans v. Wright*, 2 H. & N. 527, 27 L. J. Ex. 50.

(i) *Evans v. Wright*, *supra*.

(j) *Six Carpenters' case*, 8 Co. Rep. 290.

(k) *Attaek v. Bramwell*, 3 B. & G. 520, 32 L. J. Q. B. 146, *per* Blackburn, J., 149.

(l) *Messing v. Kemble*, 2 Camp. 115; *Winterbourne v. Morgan*, 11 East. 395; *Etherton v. Popplewell*, 1 East. 139; *Wallace v. King*, 1 H. Bl. 13.

CHAP. I. § 1.

But by 2 Will. & Mary, sess. 1, c. 5 (which first enabled a landlord to sell a distress taken for rent), it is provided and enacted, by sect. 5, "That in case any such distress and sale as aforesaid shall be made, by virtue or colour of this present Act, for rent pretended to be arrear and due, where in truth no rent is in arrear or due to the person or persons distraining, or to him or to them in whose name or names or right such distress shall be taken as aforesaid, that then the owner of such goods or chattels distrained and sold as aforesaid, his executors or administrators, shall and may, by action of trespass or upon the case, to be brought against the person or persons so distraining, any or either of them, his or their executors or administrators, recover double of the value of the goods or chattels so distrained and sold, together with full costs of suit."

In order to support an action under this statute, the goods distrained must have been sold (*m*).

Distraining
for more rent
than is due.

The tenant might at common law bring an action on the case where the distress was made for more rent than was due (*n*), even though the goods actually distrained were of less value than the rent really due (*o*).

Distraining
twice for the
same rent.

If several distresses are made for one entire rent, and it can be shown that there were sufficient goods on the premises which might have been taken under the first distress to satisfy the rent distrained for, the landlord would be liable at common law in an action on the case for distraining twice for the same rent, or the tenant might bring trespass, at his option (*p*).

Excessive
distress.

The remedy provided for an excessive distress by the statute of Marlebridge, 52 Hen. III. c. 4, is an action founded on the statute (*q*). A count in trover was often added in case the tenancy or the distress should be denied, or some goods should be taken away which were not in the inventory (*r*).

Whether a distress is excessive or not is a question for the jury (*s*); and if it be excessive, the plaintiff is entitled to

(*m*) *Salter v. Bunsden*, 4 Mod. 231; *Masters v. Farris*, 1 C. B. 715.

(*n*) *Carter v. Carter*, 5 Bing. 406.

(*o*) *Taylor v. Henniker*, 12 A. & E. 488.

(*p*) See *supra*, p. 157; *Lear v. Caldicott*, 4 Q. B. 123.

(*q*) *Hutchinds v. Chambers*, 1 Burr. 589.

(*r*) *Bishop v. Bryant*, 6 C. & P. 484; *Spargo v. Brown*, 9 B. & C. 935.

(*s*) *Smith v. Ashforth*, 29 L. J. Ex. 259. See *Walter v. Rumbald*, 1 Lord Raymond, 53.

recover the fair value of the goods, deducting for rent and expenses of distress (*t*). CHAP. I. § 1.

The mere distraining of the goods to an excessive value above the rent due, without sale or removal, was sufficient to maintain the action on the statute (*u*). The measure of damages, where the goods are removed and impounded, is the loss of the use and enjoyment of the surplus of the goods; and if they are not restored before action, the plaintiff may claim the full value of the surplus (*v*). He may recover substantial damages even if he retain the use of the goods under the distress (*w*), and nominal if he cannot prove substantial damages (*x*). Where there has been an excessive demand, and a tender of what is really due and costs and expenses, and such tender is refused and the excessive amount is distrained for and paid by the tenant under protest, the tenant is entitled to recover the amount paid by him and damages for the annoyance occasioned by the distress (*y*).

Trespass was the ordinary form of action where fixtures had been taken; but trover might be brought, although in that form of action the things converted were treated as goods and chattels, and their value as such only could be recovered (*z*). The measure of damages is the value of the fixtures as between the outgoing and incoming tenant (*a*). For distraining things not the subject of distress.

An action lies for distraining things delivered to the tenant to be dealt with in the way of his trade (*b*).

So also an action will lie for distraining implements of trade, &c., even though not in actual use at the time, if there be other sufficient distrainable goods upon the premises (*c*). When beasts of the plough or sheep are unlawfully distrained, the tenant may either rescue them or may bring an action under the 51 Hen. III. c. 4 (*d*). The plaintiff may recover

- (*t*) *Wells v. Moody*, 7 C. & P. 59; *Biggins v. Goode*, 2 C. & J. 364; *Knight v. Egerton*, 7 Exch. 407. (2) *Dalton v. Whitem*, 3 Q. B. 961; *Harvey v. Pocock*, 11 M. & W. 740; *Thompson v. Pettitt*, 10 Q. B. 101. See *supra*, p. 149.
- (*u*) *Sells v. Hoare*, 1 Bing. 401; *Swann v. Earl of Falmouth*, 8 B. & C. 456. (a) *Moore v. Drinkwater*, 1 F. & F. 134.
- (*v*) *Piggott v. Birtles*, 1 M. & W. 441, 448. (b) See *supra*, p. 150.
- (*w*) *Bayliss v. Foster*, 7 Bing. 153. (c) See *supra*, p. 153.
- (*x*) *Chandler v. Doulton*, 3 H. & C. 553, 34 L. J. Ex. 89. (d) Co. Litt. 161 a, Com. Dig. Distress (D) 5; *Keen v. Priest*, 4 H. & N. 240; *Porphrey v. Leggingham*, 2 Keble, 290. See *Davies v. Aston*, 1 C. B. 746.
- (*y*) *Fell v. Whitaker*, 41 L. J. Q. B. 78.

CHAP. I. § 1. the full value of the beasts notwithstanding the other goods on the premises liable to distress belonged to him (e).

The rolling stock of a railway company in works in which there is a siding are, as we have seen (f), protected from distress by the 35 & 36 Vict. c. 50, and by sect. 4 of that Act, a court of summary jurisdiction may make against the landlord an order for restoration of the rolling stock, or for payment of the real value thereof, and respecting costs or otherwise, and may make against the person distraining such order in the matter, and respecting costs, as to the Court shall seem just (g).

We have also seen (h) that the goods of lodgers are in certain cases protected by the 34 & 35 Vict. c. 79, and by sect. 2 of that Act it is provided that, "If any superior landlord, or any bailiff, or other person employed by him shall, after being served with the before-mentioned declaration and inventory, and after the lodger shall have paid or tendered to such superior landlord, bailiff, or other person the rent, if any which by the last preceding section such lodger is authorised to pay, shall levy or proceed with a distress on the furniture, goods or chattels of the lodger, such superior landlord, bailiff, or other person shall be deemed guilty of an illegal distress, and the lodger may apply to a Justice of the Peace for an order for the restoration to him of such goods; and such application shall be heard before a stipendiary magistrate, or before two justices in places where there is no stipendiary magistrate, and such magistrate or justices shall inquire into the truth of such declaration and inventory, and shall make such order for the recovery of the goods or otherwise as to him or them may seem just, and the superior landlord shall also be liable to an action at law at the suit of the lodger, in which action the truth of the declaration and inventory may likewise be inquired into."

If the appraisement shows that there is not sufficient distress without taking beasts of the plough, the action will not lie even if the sale shows the reverse, and the sale is not a test of value; but the plaintiff may show that the appraisement was too low, and that there was sufficient distress without resorting to the beasts of the plough (i). There is

(e) *Keen v. Priest, supra.*

(f) *Ante*, p. 151.

(g) By sect. 6, an appeal to Quarter Sessions is given.

(h) *Ante*, p. 152.

(i) *Jenner v. Yolland*, 6 Price,

3; *Smith v. Ashforth*, 29 L. J. Ex. 259.

no order in the sale of the distress, and therefore beasts may be sold before the other goods distrained (*j*). CHAP. I. § 1.

The tenant may bring an action, or may rescue the distress, where the landlord distrains or impounds after ten-
der (*k*). Action for other
illegal proceed-
ings.

An action may be brought under the 52 Hen. III. c. 4, and the 1 & 2 Philip & Mary, c. 12, s. 1 (*l*), for driving a distress out of the hundred, &c.

If the landlord remain an unreasonable time after the five days allowed by the statute (2 Will & Mary, sess. 1, c. 5, s. 2; and see 11 Geo. II. c. 19, s. 10) (*m*), the tenant may bring an action (*n*).

The tenant may bring an action for selling before the expiration of the five days allowed for replevying after the distress has been taken, and also if the landlord sell without notice (*o*).

Actions for selling without appraisement (*p*), for not selling at the best price (*q*), and for not returning the surplus after distress (*r*), may be brought by the tenant. An action of trespass would not lie for a mere omission (*s*).

The tenant may have his remedy for excessive charges under an action for not returning the surplus (*t*).

In some cases a rescue of the goods seized is justifiable. A rescue is where the owner, or some person on his behalf, takes away by force the things distrained, after they have been actually in possession of the person distraining (*u*). This may lawfully be done before the goods are impounded,

(*j*) *Jenner v. Yolland*, 6 Price, c. 5, s. 2, *supra*, p. 163; and see also 11 Geo. II. c. 19, s. 9.

(*k*) *Six Carpenters' case*, 8 Co. 147 a, Co. Litt. 160 b; *Smith v. Goodwin*, 4 B. & Ad. 113; *Branscomb v. Bridges*, 1 B. & C. 445. See p. 209.

(*l*) See p. 162.

(*m*) See p. 163.

(*n*) *Winterbourne v. Morgan*, 2 Camp. 117, 11 East. 395; *Etherington v. Popplewell*, 1 East. 139; *per Lord Denman in Ladd v. Thomas*, 12 Ad. & E. 117.

(*o*) See the 2 W. & M. sess. 1,

(*p*) See *supra*, p. 163.

(*q*) See *supra*, p. 163.

(*r*) See *supra*, p. 163. In this action the reasonableness of the charges of distraining may be disputed. *Lyon v. Tomkies*, 1 M. & W. 603.

(*s*) *Messing v. Kemble*, 2 Camp. 115.

(*t*) See *supra*, pp. 165, 166.

(*u*) *Buller's Nisi Prius*, 84; Co. Litt. 160.

CHAP. I. § 1. if the distress be wrongful, but not after (v). Whenever a distrainer abandons a distress, the retaking of it by the tenant or owner is not a rescue (w). The owner may prevent the distrainer from abusing a distress by working it, and it is no rescue (x).

By the 2 Will. & Mary, sess. 1, c. 5, s. 4, on any pound-breach, or rescue of goods distrained for rent, the person grieved thereby shall, in a special action on the case, recover his treble (y) damages and costs against the offender, or against the owner of the goods, if they afterwards be found to come into his use or possession (z).

Replevin.

Wherever personal (a) goods or chattels have been wrongfully (b) taken under a distress, the tenant or owner, if he do not rescue them, but suffer them to be impounded, may replevy them, that is, he may retake his goods out of the pound upon giving security to the officer that he will bring an action against the landlord for the seizure, and if judgment be given against him, restore the goods. So long as the goods remain unsold, the tenant may replevy, although after the five days allowed by the statute (c). Goods under an execution or other process of law cannot be replevied (d).

Replevin extends to all wrongful *takings* of goods or cattle (e), but not to a mere detention (f), provided the things taken are not such as are exempt from distress as fixtures (g).

Replevin was the remedy where the distress was illegal if

- (v) Co. Litt. 47 b. 161 a; Buller's Nisi Prius, 61 a; Bevil's case, 4 Co. Rep. 11 b; Keen v. Priest, 4 H. & N. 240; Cotesworth v. Bettison, 1 Salk. 247, 1 Lord Raymond, 105.
- (w) Dodd v. Morgan, 6 Mod. 216; Smith v. Wright, 6 H. & N. 821, 30 L. J. Ex. 313; Knowles v. Blake, 5 Bing. 499.
- (x) Smith v. Wright, *supra*. 1
- (y) But now, in lieu of treble costs, a reasonable indemnity may be recovered. See 5 & 6 Vict. c. 97, s. 2.
- (z) See as to cattle impounded, damage feasant, 6 & 7 Vict. c. 30.
- (a) Dalton v. Whitem, 3 Q. B. 961; Niblett v. Smith, 4 T. R. 504. Replevin lies for growing corn, &c., taken under a distress, under 11 Geo. II. c. 19, s. 8.
- (b) See *supra*, p. 167.
- (c) Jacob v. King, 5 Taunt. 451; Anon. 1 Chitty's Rep. 196 a; Griffiths v. Stephens, ib.
- (d) Winnard v. Forster, 2 Lutch. 1190; Cannon v. Smallwood, 3 Lev. 204; George v. Chambers, 11 M. & W. 149; 2 Chitty's Archbold, 1071, 11th edit.; Allen v. Sharp, 2 Ex. 352; Marshall v. Pitman, 9 Bing. 595; Wilson v. Weller, 1 B. & B. 57; Wooton v. Harvey, 6 East. 75; Rex v. Hoseaston, 14 East. 605.
- (e) Per Parke B. in George v. Chambers, 11 M. & W. 159.
- (f) Galloway v. Bird, 4 Bing. 299.
- (g) Niblett v. Smith, 4 T. R. 504. An action of replevin would, however, lie for goods in trade, &c., see Woodfall, L. & T. 789, 9th ed.

it was excessive, trespass was the form of action (*h*), unless tender had been made before impounding, when there arose a constructive taking *de novo* (*i*). CHAP. I. § 1.

Proceedings in replevin were not generally advantageous to the tenant. It is true that he obtained immediate possession of the things distrained (*j*), but if the distress was in any degree lawful he had to pay what was due together with costs, and if it was wholly illegal he could recover no special damage, but only the expenses incurred in obtaining the replevy and the costs of the action (*k*). The usual plan adopted was, therefore, to procure some one to buy the things distrained, and then to bring an action in which substantial and even special damage might be recovered (*l*).

Replevin could not be joined with any other cause of action (*m*). After obtaining judgment, the plaintiff cannot maintain another action for irregularities in the same distress (*n*).

Formerly the sheriff, upon the application of the owner and the execution of a replevin bond, took the goods from the distrainer and re-delivered them to the owner; but now by the 19 & 20 Vict. c. 108, these powers are transferred to the registrar of the County Court of the district in which the distress is taken, and to the high bailiff (*o*). By sects. 65 and 66 of this Act, the replevin may be commenced in any superior Court in the form applicable to personal actions therein, upon such security being given to the registrar as therein mentioned, provided a question of title is involved, or the rent exceeds £20 (*p*). Even where a question of title is involved, or the damage exceeds £20, the action may be brought in the County Court, subject to a power of removal

(*h*) *Johnson v. Upham*, 2 E. & E. 250; 28 L. J. Q. B. 256.

(*i*) *Evans v. Elliot*, 5 A. & E. 142.

(*j*) *Mennie v. Blake*, 6 E. & B. 846.

(*k*) Which in the County Court would be very small, the damages being under £5, 9 & 10 Vict. c. 95, s. 91, unless perhaps the value of the goods may be taken into account for the sake of costs. Woodfall, L. & T. 9th ed., 804, 815 n (b).

(*l*) *Bodley v. Reynolds*, 8 Q. B. 779; *Keene v. Dilke*, 4 Exch. 388;

(*m*) County Court Rules, No. 177,

15 & 16 Vict. c. 76, s. 41. But see now Jud. Act, 1875, Order xvii.

(*n*) *Phillips v. Berryman*, 3 Doug. 286; *White v. Willis*, 2 Wils. 87; *Pease v. Chaytor*, 1 B. & S. 658, 662, 3 ib. 620, 634, 647, 32 L. J. M. C. 121.

(*o*) Sects. 63-66, 71, and see 9 & 10 Vict. c. 95, ss. 119, 120.

(*p*) By s. 22 of the Common Law Procedure Act, 1860 (23 & 24 Vict. c. 126), the provisions of 19 & 20 Vict. c. 108, are extended to all cases of replevin.

CHAP. I. § 1. by the defendant under sect. 67, and to an appeal where the rent claimed exceeds £20 (*g*).

Actions in the County Court must be commenced within one month from the date of the bond (*r*), and actions in the superior Courts within one week (*s*).

The action must be prosecuted "with effect," *i.e.*, success (*t*), and "without delay," that is, with diligence (*u*), or the bond will be forfeit.

Particulars specifying and describing the cattle or goods of the taking of which the plaintiff complains, should be given in the warrant to the bailiff, directing him to make the replevy, and again delivered on entering the plaint (*v*). The value need not be stated, for the plaintiff must in any case enter into security for the amount in respect of which the distress is made, including costs (*w*).

Notice should be given to the distrainer of the replevin, otherwise an action will not lie against him for selling after replevin (*x*).

As to payment into Court, see Wilson's Jud. Acts, p. 231.

If the defendant obtains a verdict, he is entitled to a return of the goods, and to recover his rent and costs (*y*). And in the County Court the defendant may require the Court to find the value of the distress. If the value is less than the rent, judgment must be given for the amount of such value; if the rent is less than the value, judgment must be given for the amount of the rent (*z*).

(*g*) *White v. Greenish*, 11 C. B. N.S. 209. As to appeal see 13 & 14 Vict. c. 61, ss. 14-16; 19 & 20 Vict. c. 108, ss. 68, 71. County Court Rules, 139-150.

(*r*) 19 & 20 Vict. c. 108, s. 66.

(*s*) 19 & 20 Vict. c. 108, s. 65.

(*t*) See judgment of the Court in *Perreau v. Bevan*, 5 B. & C. 300.

(*u*) *Gent v. Cutts*, 11 Q. B. 288.

(*v*) County Court Rule, No. 260.

(*w*) 19 & 20 Vict. c. 108, ss. 65, 66, 71.

(*x*) *Mounsey v. Dawson*, 6 A. & E. 752.

(*y*) 17 Car. II. c. 7, s. 2; 7 Hen. VIII. c. 4, s. 3; 21 Hen. VIII. c. 19, s. 3. This is ascertained upon a writ of inquiry to the sheriff, 2 Chit. Arch. 1079, or defendant may proceed upon the replevin bonds.

(*z*) See County Court Rules, 1857, No. 180.

CHAPTER II.

DUTY TO REPAIR AND CULTIVATE.

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IRRESPECTIVE of the duty of the tenant to repair and keep in repair the premises according to his covenant (see *ante*, pp. 82–84, 100, 101), there are other duties to be performed by the tenant in the nature of repair and preservation. Thus (1) he may not commit waste; (2) he may be liable for damage by fire; (3) and he will in general be bound to cultivate the premises according to his covenant or the custom of the country.

1. WASTE.

THERE is an obligation on the part of the lessee to see that no injury is done to the inheritance by his own wilful or negligent conduct, and a breach of such obligation will render him liable to be punished for waste (*a*). Whatever does lasting damage to the freehold or inheritance, or anything which alters the nature of the property, so as to render the evidence of ownership more difficult, or to destroy or weaken the proof of identity, or diminish the value of the estate, or increase the burden upon it, is waste (*b*). It is either voluntary or permissive,—the one an offence of commission, as pulling down a house; the other of omission, as allowing a house to fall for want of necessary repairs. It may be incurred in respect of—1. The soil; 2. The buildings; 3. The trees, fences, &c.; 4. The live stock (*c*).

A tenant in fee-simple or fee-tail has power to deal with the property as he pleases (*d*). But it is otherwise with regard to tenants of lesser estates, although they are entitled to reasonable *estovers* and *boles* for purposes of repairs, &c. The rules, however, vary in their application according to the

(a) Co. Litt. 53 a. with, Hob. 234; Phillips v. Smith, 14 M. & W. 589, 593.
 (b) 4 Co. Rep. 64, Co. Litt. 68 a; Huntley v. Russell, 23 Q. B. 572, judgment of Patterson, J. 588; Doe d. Grubb v. Lord Burlington, 5 B. & Ad. 507, 517; Lord Darcy v. Ask-
 (c) It is also voluntary waste to destroy heirlooms, 1 Cruise's Dig. tit. 3, s. 14.
 (d) 11 Co. 50 a, Plowden, 259.

CHAP. II. § 1. particular estate, since there was a distinction at common law between the tenants of estates created by the act of law, and tenants of estates created by the contract of parties (*e*). With regard to voluntary waste, a tenant for years stands in the same situation as a tenant for life (*f*); but it would seem that the liability of the tenant for years for permissive waste is less than that of a tenant for life (*g*). With regard to a tenant strictly at will, it is laid down by Littleton, s. 71, that he cannot commit waste at all (*h*).

1. To the soil. Voluntary waste may be committed if the tenant in any manner essentially varies the nature of the soil or produce, or changes its face. Thus to convert arable land into pasture, to sow grain in hop-grounds, or to build a house upon the land, is waste (*i*); or to dig and carry away the soil, or to open mines or pits, but not to work those already open, provided that they have not been abandoned by the owner of the inheritance for the permanent advantage of the estate (*j*). Nor is it waste to take the soil for the purpose of reparation or improvement, as to dig a trench to drain the water (*k*). Permissive waste to the soil may be committed if the tenant by his negligence suffer the land to be surrounded or overflowed with water, but not if the overflow be caused by tempest, unless he omit to repair the damage (*l*).

2. Voluntary waste to buildings may be committed by the tenant if he pull them down, unroof or alter them (*m*). So it was waste if the tenant removed anything affixed to the freehold, even if he originally put it there (*n*). But this rule is now considerably relaxed in favour of the tenant (*o*).

(*e*) See statutes of Marlebridge (52 Hen. III. c. 13) and of Gloucester (6 Edw. I. c. 5), Lord Coke's 2 Inst. 299.

(*f*) See Viner's Abr. Waste (S).

(*g*) Gibson v. Wells, 1 New Rep. 290; Herne v. Benbow, 4 Taunt. 764; Jones v. Hill, 7 Taunt. 392. But see Co. Litt. 53, 2 Inst. 298; Harnett v. Maitland, 16 M. & W. 257; Yellowby v. Gower, 11 Ex. 294; Notes to Greene v. Cole, 2 Wms. Saund. 252.

(*h*) See Harnett v. Maitland, *supra*; but *semble* he is liable to an action for commissive waste. Co. Litt. 57 a; Countess of Shrewsbury's case, 5 Co. R. 23 a; Gibson v. Wells, 1 B. & P. N. R. 290.

(*i*) Co. Litt. 53 a; Harrow School v. Alderton, 2 Bos. & P. 86; Wetherell v. Howells, 1 Camp. 227, Bac. Abr. Waste (C) 3; Simmons

v. Norton, 7 Bing. 640; Hutton v. Warren, 1 M. & W. 472.

(*j*) Co. Litt. 53 a; Bagot v. Bagot, 32 Beavan, 509. 33 L. J. Ch. 116; Huntley v. Russell, 13 Q. B. 572.

(*k*) Moyle v. Moyle, Owen, 67; Altham's case, 2 Rol. Abr. 820, l. 23.

(*l*) Co. Litt. 53 b; Viner's Abr. Waste, 1; Reg. v. Leigh, 10 A. & E. 398. See Paradine v. Jane, Aleyn, 27.

(*m*) Co. Litt. 53 a; Doe d. Grubb v. Burlington, 5 B. & Ad. 511.

(*n*) Co. Litt. 53 a; and the Court will interfere by injunction to prevent the removal of fixtures by the tenant, and advertising a sale of them, Richardson v. Ardley, 38 L. J. Ch. 508.

(*o*) See *infra*, Part 3, c. 7, Fixtures.

Permissive waste to buildings may be committed if the tenant omit to keep them in tenantable repair, and he will be liable if, owing to such neglect, damage be occasioned by the act of God; but if the buildings are destroyed by the act of God or the Queen's enemies, it is not waste (*p*). Before the 6 Anne c. 31 (now repealed), tenants in whose houses accidental fires commenced were liable for waste (*q*).

3. Voluntary waste may also be committed if the tenant cuts down or lops timber so as to occasion its decay (*r*). It is, however, not waste if the tenant cut them down and use them for the necessary and actual repairs of the buildings which existed when he entered. But if the decay had been occasioned by his own default, and he cuts down timber for the repair, he will be liable for double waste (*s*). To cut down trees, not being timber, if they are a defence or shelter to the house, is also waste (*t*). So is the doing of any act which causes a decay of the wood. So destroying fruit-trees in the garden or orchard is waste (*u*).

The tenant, however, may cut down timber-trees that are dead (*v*); he may also cut such trees as are not timber, and do not grow in defence of the house (*w*); but if he improperly cut or grub up the trees, hedges, &c., he will be guilty of waste (*x*).

4. Voluntary waste may be done in respect of animals, by taking or destroying so many of them as to unstock the dove-cote, warren, park, or fishpond, in which they are kept (*y*): and it is waste if the tenant stop the pigeon-holes so that the pigeons cannot build (*z*). It is permissive waste if the tenant suffer the park-paling to be decayed, so that the deer stray and are lost (*a*).

(*p*) Co. Litt. 53 a; Reg. v. Leigh, 10 A. & E. 398.

(*q*) See *infra*, Fire, p. 178.

(*r*) Co. Litt. 53 a. Trees must be above twenty years old to be timber; Dunn v. Bryan, 7 Ir. R. Eq. 143. Oak, ash, and elm of that age are always considered timber; 2 Inst. 643; Aubrey v. Fisher, 10 East. 431. Others may by local custom be accounted timber; see the judgment of the Court in Phillips v. Smith, 14 M. & W. 589, 593, citing Lord Darcy v. Askwith, Hob. 234.

(*s*) Co. Litt. 53 b; Darcy v. Askwith, Hob. 238; Gorges v. Stanfield, Cro. Eliz. 593; Simmons v. Norton,

7 Bing. 640, Com. Dig. Waste (D) 5; Doe d. Foley v. Wilson, 11 East. 56.

(*t*) Co. Litt. 53 a; Phillips v. Smith, *supra*; Dunn v. Bryan, *supra*.

(*u*) Co. Litt. 53 a; Id. note (6). See Wetherell v. Howells, 1 Camp. 227.

(*v*) Co. Litt. 53 b

(*w*) Gage v. Smith, 2 Rol. Abr. 817, l. 17; Dunn v. Bryan, 7 Ir. R. Eq. 143.

(*x*) Co. Litt. 53 b; Dunn v. Bryan, *supra*.

(*y*) Ibid.

(*z*) Moyle v. Moyle, Owen, 66.

(*a*) Ibid.

CHAP. II
Without im-
peachment of
waste.

A tenant for life "without impeachment of waste," might cut down trees and open mines, and is entitled to the timber when they are cut down (*b*); but he would have been restrained by injunction from pulling down houses, and cutting down ornamental or sheltering timber (*c*), and from taking the lead and tiles off a house (*d*), and now he has no legal right whatever to commit waste of this description, unless an intention to confer such right expressly appears by the instrument creating the estate. See Jud. Act, 1873, s. 25 (2).

An action of trespass for waste cannot be maintained by one tenant in common against another (*e*).

2. FIRE.

Fire.

If the premises were accidentally or negligently destroyed by fire, the tenant would not at common law have been guilty of waste if he neglected to rebuild them (*f*). By the statute of Gloucester (6 Edw. I. c. 5), tenants for life or years were made liable for waste without any exception, and were therefore rendered answerable for destruction by fire (*g*). But by 14 Geo. III. c. 78, s. 86 (*h*), "No action, suit, or process whatsoever shall be had, maintained, or prosecuted against any person in whose house, chamber, stable, barn, or other buildings, or on whose estate any fire shall accidentally begin," provided "that no contract or agreement made between landlord and tenant shall be hereby defeated or made void."

The statute does not apply to fires produced by malice or negligence (*i*). This statute is not "local and personal," and extends to the whole kingdom (*j*).

The statute specially excepts all express contracts as to waste by fire; and, therefore, where the tenant covenants to repair the premises and to leave them in repair, and accidents

(*b*) *Pyne v. Dor*, 1 T. R. 55; (*h*) Repealing 6 Anne, c. 31. See *Gordon v. Woodford*, 27 Beav. 603, Chitty's Statutes, vol. 2, tit. 29 L. J. Ch. 222.

(*c*) See *post*, Injunction, p. 183.

(*d*) *Vane v. Lord Barnard*, 1 T. R. 56 n.

(*e*) *Jacob v. Seward*, L. R. 4 C. P. 518.

(*f*) Co. Litt. 53 b.

(*g*) *Countess of Salop's case*, 5 Rep. 13 Co. Litt. 57 a (n), 377.

(*i*) *Filliter v. Phippard*, 11 Q. B. 355; *Vaughan v. Taiff Vale Ry.* 5 H. & N. 679; *Vaughan v. Manlove*, 4 Scott, 244.

(*j*) *Richards v. Easto*, 15 M. & W. 244; *ex parte Goreley*, in *re Barker*, 34 L. J. Bkt. 1.

by fire are not excepted, the tenant will be compelled to rebuild the premises if they are burnt down (*k*), and even to pay the rent (*l*), and he will be liable to pay rent even though he is exempted as to repairs by his covenants (*m*). Where rent was to be paid quarterly "damage by fire excepted," and the premises kept and left in repair "damage by fire excepted" and they were partly destroyed, it was held that the whole rent was not suspended but only a proportional part (*n*).

3. CULTIVATION.

Although it is waste to change the face or character of the soil (*o*), yet it is not waste to neglect to cultivate it (*p*). But we have seen, *ante*, Part I, c. 4, s. 7, pp. 84, 101, 138, that covenants to farm according to the custom of the country, in a husband-like manner, are either expressly made in most leases, or arise from the mere relation of landlord and tenant (*q*). Where the custom is not excluded by the terms of the agreement, it is not necessary to prove that such custom is immemorial, if a reasonable usage can be shown (*r*). Cultivation.

By 56 Geo. III. c. 50, s. 1 (*s*), no sheriff shall, by virtue of any process, "carry off, or sell, or dispose of, for the purpose of being carried off from any lands let to farm, any stacks, thrashed or unthrashed, or any straw of crops growing, or any chaff, colder, or any turnips, or any manure, compost, ashes, or sea-weed, in any case whatsoever; nor any hay, grass, or grasses, whether natural or artificial, nor any tares or vetches, nor any roots or vegetables, being produce of such lands, in any case where, according to any covenant or written agreement entered into and made for the benefit of the owner or landlord of any farm, such hay, &c., ought not to be taken off or withholden from such lands, or which, by the tenor or

(*k*) *Earl of Chesterfield v. Duke of Bolton*, Comyn, 267; *Poole v. Archer*, Skin. 210; *Bullock v. Dommitt*, 6 T. R. 650.

(*l*) *Weigall v. Waters*, 6 T. R. 488; *Izon v. Gorton*, 5 Bing. N. C. 501; *Holtzappel v. Baker*, 4 Taunt. 45; *Paekker v. Gibbins*, 1 Q. B. 421; *Loft v. Dennis*, 1 E. & E. 474.

(*m*) *Monk v. Cooper*, 1 Ld. Raym. 1477; *Belfour v. Weston*, 1 T. R. 310.

(*n*) *Bennett v. Ireland*, 1 E. B. & E. 326.

(*o*) See *ante*, p. 174.

(*p*) *Hutton v. Warren*, 1 M. & W. 472, *per Parke*, B.

(*q*) See also *infra*, Part 3, c. 6, Emblements.

(*r*) *Dalby v. Hirst*, 1 B. & B. 224; *Legh v. Hewitt*, 4 East. 154; *Earl of Falmouth v. Thomas*, 1 C. & M. 89. If a particular custom is alleged, it must be proved as alleged. See *Angerstein v. Handson*, 1 C. M. & R. 789.

(*s*) See *ante*, p. 148, Distress.

CHAP. II § 1. effect of such covenants or agreements, ought to be used or expended thereon, and of which covenants or agreements such sheriff shall have received a written notice before he shall have proceeded to sale." Sect. 2 provides, that the tenant shall give notice to the sheriff of the existence of such covenants, and of the name and residence of the landlord; that the sheriff shall give notice to the landlord of the seizure of the crops; and that, if he hears nothing from him, he shall put off the sale as long as he legally can. Subsequent sections provide, however, that such produce may be sold, subject to an agreement to expend it on the land, according to the custom of the country, where there is no covenant or agreement, and according to such contract, where there is. In case of such qualified sale, the purchasers may use all such necessary barns, buildings, yards, and fields, for the purpose of consuming such produce, as the sheriff shall assign for the purpose, and which the tenant would have been entitled to, and ought to have used for the like purpose. By sect. 11, the assignees of bankrupt or insolvent tenants, together with all purchasers whatsoever, are prevented from disposing of the crops in any other manner than the bankrupt, &c., himself might do (*t*). By 14 and 15 Vict. c. 25, s. 2, growing crops seized and sold under an execution, are liable for accruing or subsequent rent.

SECTION I.

HOW ENFORCED.

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For the breach of a covenant to repair, the landlord has two remedies—one by action, and another by entry or ejectment. For waste the landlord has a remedy by action and by injunction.

1. ACTION FOR NON-REPAIR.

Action for non-repair.

An action of covenant might be brought by the landlord against the tenant for non-repair where the lease was under

(*t*) *Wilmot v. Rose*, 3 E. & E. 563; *ex parte*, *Maundrell*, 2 Mad. 315; *ex parte*, *Whittington Buck*, 87; *ex parte*, *Nixon*, 1 Rose, 445.

seal (*u*); but where it was not under seal, the action must have been in the form of assumpsit for breach of the promise to repair, or case for the breach of duty (*v*).

CHAP. II. § 1.

An action for non-repair may be maintained before the expiration of the lease, where a lessee has covenanted to repair, and keep in repair, during the continuance of the term (*w*); and in such action, the landlord may recover damages commensurate with the injury to the marketable value of the reversion, and not the amount required to put the premises in repair (*x*). But where the lease is determined, as by forfeiture, it is otherwise (*y*).

Where the landlord does the repairs himself (as, for instance, where being himself lessee he was anxious to do so to save a forfeiture) he can only recover nominal damages; for as the premises are repaired there is at the time of bringing the action no injury to the reversion (*z*).

In the absence of actual loss a lessee can only recover nominal damages against his assignee of the term, for breach of covenant to keep in repair, although his lessors have actually commenced an action against him for his breach in not repairing, for the lessee has parted with his reversion, and although he is liable on his covenants with his landlord, yet the assignee is the person primarily liable (*a*).

The landlord may also recover a compensation for the loss of the use of the premises while the repairs are being effected (*b*); but he cannot recover the costs of alterations necessary to enable him to carry on his business in new premises, nor their rent, nor the cost of restoring them to their original state (*c*).

(*u*) A covenant to repair must be express, but an implied one of a similar nature arises from the relation of landlord and tenant. See *supra*, c. 4, s. 7, subsects. (a.) and (b.)

(*v*) *Kinlyside v. Thornton*, 2 W. Bl. 1111; *Marker v. Kenrick*, 13 C. B. 188. See also *Elliott v. Johnson*, 8 B. & S. 38, L. R. 2 Q. B. 120, 36 L. J. Q. B. 44; forms of actions are now practically abolished, but the old distinctions are nevertheless useful, as they still indicate the principles of law which govern particular classes of facts.

(*w*) *Luxmore v. Robson*, 1 B. & A. 584.

(*x*) *Worcester School Trustees v. Rowlands*, 9 C. & P. 734; *Smith v. Peat*, 9 Ex. 161; *Turner v. Lamb*, 14 M. & W. 412; *Mills v. East London Union*, 21 W. R. 142, 27 L. T. N.S. 557.

(*y*) *Davies v. Underwood*, 27 L. J. Ex. 113, 2 H. & N. 570.

(*z*) *Williams v. Williams*, 43 L. J. C. P. 382; L. R. 9 C. P. 659; but see *Colley v. Streeton*, 2 B. & C. 273.

(*a*) *Beattie v. Quirey*, 10 Ir. R. C. L. 516 Exch.

(*b*) *Woods v. Pope*, 1 Bing. N. C. 467.

(*c*) *Green v. Eales*, 2 Q. B. 225.

CHAP. II. § 1.

The amount of damages also depends upon the condition of the premises at the time of the demise (*d*).

An action for non-repair of fences will lie, as such repair is a duty which is cast upon the tenant (*e*). Tenants at will, however, do not seem to be liable for non-repair of fences or permissive waste (*f*).

Sometimes the landlord takes upon himself the duty of repairing, and the tenant is then protected (*g*).

2. ACTION FOR WASTE.

Action for waste. An action on the case did not lie for permissive waste (*h*), but it lay for acts done by a tenant while holding over after the expiration of a notice to quit (*i*), and against a tenant's executor for waste committed within six months before the tenant's death (*j*).

3. ENTRY OR RECOVERY BY ACTION.

Entry or action for recovery.

A breach of a covenant to repair will not justify a re-entry for a forfeiture, unless there is in the lease or agreement (*k*) a proviso for re-entry in case of non-repair; nor will such a breach support an action for the recovery of land; but if there be such a proviso, the landlord may re-enter or maintain an action upon breach at any time during the term (*l*).

An action of ejectment under a power of re-entry was held to be maintainable by an assignee of the reversion of a lease upon a breach of covenant to repair without giving the tenant notice of the assignment (*m*).

The courts will not decree the specific performance of a

(*d*) *Stanley v. Towgood*, 3 Bing. N. R. 290; *Martin v. Gilham*, 7 A. & E. 540; *Harnett v. Maitland*, 16 M. & W. 257.
(*e*) *Cheetham v. Hampson*, 4 T. R. 318; *Russell v. Shenton*, 3 Q. B. 449; *Chauntler v. Robinson*, 4 Ex. 163; *Whitfield v. Weedon*, 2 Chit. R. 685.

(*f*) See *ante*, p. 175, Waste.
(*g*) See *post*, Duties of Landlords, Ch. III.
(*h*) *Herne v. Benbow*, 4 Taunt. 764; *Gibson v. Wells*, 1 Bos. & P.

(*i*) *Burchell v. Hornsby*, 1 Camp. 360.

(*j*) 3 & 4 Will. IV. c. 42, s. 2.

(*k*) See *Hayne v. Cummings*, 16 C. B. N.S. 421.

(*l*) *Doe d. Hills v. Morris*, 11 L. J. Ex. 313; *Bennet v. Herring*, 3 C. B. N.S. 370; *Baylis v. Le Gros*, 4 C. B. N.S. 537.

(*m*) *Scaltock v. Harston*, L. R. 1 C. P. D. 106; 45 L. J. C. P. 125.

general covenant to repair, but will leave the party to his remedy by action (n). CHAP. II. § 1.

It was held that no injunction would be granted by a court of equity to restrain an action of ejectment for not repairing (o).

4. INJUNCTION.

By the Judicature Act, 1873, sect. 25, subs. 8, it is provided that, "a mandamus or an injunction may be granted, or a receiver appointed by an interlocutory order of the Court (p), in all cases in which it shall appear to the Court to be just or convenient that such order should be made; and any such order may be made either unconditionally or upon such terms and conditions as the Court shall think just; and if an injunction is asked either before, or at, or after the hearing of any cause or matter to prevent any threatened or apprehended waste or trespass, such injunction may be granted if the Court shall think fit, whether the person against whom such injunction is sought is or is not in possession under any claim of title or otherwise, or (if out of possession) does or does not claim a right to do the act sought to be restrained under any colour of title; and whether the estates claimed by both or by either of the parties are legal or equitable (q).

(n) *Hill v. Barclay*, 16 Ves. 405; *City of London v. Nash*, 1 Ves. 12; *Lucas v. Commerford*, 3 Bro. C. C. 166; *Paxton v. Newton*, 2 Sm. & Giff. 437.

(o) *Hill v. Barclay*, 16 Ves. 405; *Gregory v. Wilson*, 9 Hare, 683; *Job v. Banister*, 2 Kay & J. 374, 26 L. J. Ch. 125. See, however, *Bargent v. Thompson*, 4 Giff. 473; *Bamford v. Creasy*, 3 Giff. 675; *Hughes v. Met. Ry. Co.* L. R. 1 C. P. D. 120 C. A. where it seems the Court will do so under special circumstances.

(p) If the relief applied for is a substantial part of what the action is for, the writ ought to be indorsed accordingly. See *Wilson*, Jud. Act, note to Order II. Rule 1.

(q) By the Judicature Act, 1875, Order III. Rule 2, "It shall be lawful for the Court or a Judge, on the application of any party to any action to make any order for the sale by any person or persons named

in such order, and in such manner, and on such terms as to the Court or judge may seem desirable, of any goods, wares, or merchandise, which may be of a perishable nature or likely to injure from keeping, or which for any other just or sufficient reason it may be desirable to have sold at once."

And by rule 3, "It shall be lawful for the Court or a Judge, upon the application of any party to an action, and upon such terms as may seem just, to make any order for the detention, preservation, or inspection of any property being the subject of such action, and for all or any of the purposes aforesaid, to authorise any person or persons to enter upon or into any land or building in the possession of any party to such action, and for all or any of the purposes aforesaid, to authorise any samples to be taken or any observation to be made, or experiment to be tried, which may

CHAP. II. § 1.

Formerly an injunction could only be obtained in a Court of common law where an injury had been actually committed, and even in a court of equity an injunction would not issue if the party sought to be restrained was in possession, or if out of possession, was a mere stranger; but if he is out of possession, but is acting under colour of right, then the Court would grant an injunction (*r*). All these nice distinctions are now abolished by the above section.

The party to whom the reversion belongs may apply to the Court for an injunction to restrain commissive waste (*s*), and this is a most efficient remedy, as the Court interferes to prevent the injury from being done, and does not merely grant a remedy for it when done.

An injunction was given to restrain injury to fish-ponds (*t*). Tenants are usually restrained from removing hay, straw, dung, &c., contrary to their express covenants, and from removing fixtures attached to the freehold (*u*). Where the lease contained no express covenant not to plough the pasture, but a covenant to manage pasture in a husband-like manner, an injunction was granted to restrain the tenant from ploughing the pasture (*v*).

In granting an injunction to restrain the tenant from breaking up a meadow for the purpose of building, contrary to an express covenant in the lease, Eldon, L. Ch., said that he did so upon the ground of the covenant not to convert the meadow, otherwise he should doubt whether it would do

seem necessary or expedient for the purpose of obtaining full information or evidence."

And by rule 4, "An application for an order under section 25, subsection 8 of the Act, or under rules 2 and 3 of this order, may be made to the Court or a Judge by any party. If the application be by the plaintiff for an order under the said subsection 8, it may be made either *ex parte* or with notice, and if for an order under the said rules 2 or 3 of this order, it may be made after notice to the defendant at any time after the issue of the writ of summons, and if it be by any other party, then on notice to the plaintiff, and at any time after appearance by the party making the application."

(*r*) *Lowndes v. Beetle*, 33 L. J. Ch. 451.

(*s*) Com. Dig. Chancery (D) 11; *Smith v. Carter*, 18 Beav. 78; *Duke of Beaufort v. Bates*, 31 L. J. Ch. 481; *Farrant v. Lovel*, 3 Atk. 723; *Jackson v. Cator*, 5 Ves. 688; *Mayor of London v. Hedger*, 18 Ves. 355; *Norway v. Rowe*, 19 Ves. 154; *Hindley v. Emery*, L. R. 1 Eq. 52, 35 L. J. Ch. 6; *Onslow v. —*, 16 Ves. 173; *Pratt v. Brett*, 2 Madd. 62; *Drury v. Molina*, 6 Ves. 328; *Lord Grey de Wilton v. Saxon*, 6 Ves. 106; *Kimpton v. Eve*, 2 V. & B. 349.

(*t*) *Earl of Bathurst v. Burden*, 2 Bro. C. C. 64.

(*u*) *Kimpton v. Eve*, 2 V. & B. 352; *Pratt v. Brett*, 2 Madd. 62; *Fleming v. Snook*, 5 Beav. 250.

(*v*) *Drury v. Molina*, 6 Ves. 328.

upon the ground of waste, without any affidavit that it was an ancient meadow (*w*). CHAP. II. § 1.

The Court cannot undertake to direct how the country should be cultivated (*x*), and will only interfere to prevent some particular and permanent injury.

The Court will not grant an injunction against a tenant for having done an act of waste for which merely nominal damages would be given, where it appears that he has not the least intention to commit further waste (*y*).

The Court will restrain a tenant from committing acts in the nature of waste against the wish of the landlord, even if they be to the landlord's advantage (*z*), but not if the landlord stand by at first and see the act done and approve of it (*a*).

A mortgagor may have an injunction to stay waste against a mortgagee for cutting down timber, and not applying the proceeds of the sale in sinking the principal and interest; and so likewise may a mortgagee where a mortgagor commits waste (*b*). A tenant in common may have an injunction to restrain his co-tenant from committing destructive waste (*c*); but not from farming contrary to the custom of the country, because the relation of landlord and tenant does not exist between them (*d*).

A covenant to repair and leave in good condition will not prevent the landlord from claiming an injunction (*e*), nor will a right of re-entry (*f*).

It was held that in order to obtain an injunction, some actual waste, or some act showing an intention to commit actual waste, must appear by affidavit (*g*), as sending a surveyor out to mark trees, or threatening or insisting upon the

(*w*) Lord Grey de Wilton v. Saxon, 6 Ves. 106.

(*x*) 1 Musgrave v. Horner, 31 L. T. N.S. 632; Dunn v. Bryan, 7 Ir. R. Eq. 143.

(*y*) Doran v. Carroll, 11 Ir. Ch. R. 379.

(*z*) Smith v. Carter, 18 Beav. 78.

(*a*) See Brydges v. Kilbourne, cited in Jackson v. Cator, 5 Ves. 688.

(*b*) Farrant v. Lovel, 3 Atk. 723.

(*c*) Arthur v. Lamb, 2 D. & M. 428.

(*d*) Bailey v. Hobson, L. R. 5 Ch. 180, 39 L. J. Ch. 270.

(*e*) Mayor of London v. Hedger, 18 Ves. 355.

(*f*) Parker v. Whyte, 1 H. & M. 167, 32 L. J. Ch. 520.

(*g*) Amos on Fixtures, 284 (2d edit.)

CHAP. II. § 1. right to commit waste (*h*); but now as above stated (*i*), it is not necessary to show actual waste, though the Court would still require to be satisfied that some injury was really apprehended, and it would not be sufficient to say that the injunction would do the defendant no harm (*j*).

Where formerly a lease was made "without impeachment of waste," the tenant was not restrained from cutting timber, ploughing pasture land, opening mines, &c. (*k*), but he was restrained from pulling down houses, defacing seats, or cutting down ornamental or sheltering timber (*l*), and now he has no right to commit such waste unless an intention to confer such a right is clearly expressed in the instrument creating the estate (*m*).

(*h*) *Jackson v. Cator*, 5 Ves. 688; *Gibson v. Smith*, 2 Atk. 182, 166, 3 Id. 549; *Marquis of Downshire v. Lady Sandys*, 6 Ves. 107; *Barnard*, 491, 497; *Tipping v. Eckersley*, 2 K. & J. 264.

(*i*) *Ante*, p. 183.

(*j*) *Dunn v. Bryan*, *supra*.

(*k*) Com. Dig. tit. Chancery, (D) 11.

(*l*) *Williams v. Day*, 2 Cas. Ch. 32; *Packington's case*, 3 Atk. 215;

Garth v. Cotton, Id. 756; *Chamberlayne v. Dumorier*, 1 Bro. C. C. 166, 3 Id. 549; *Marquis of Downshire v. Lady Sandys*, 6 Ves. 107; *Ford v. Tynte*, 31 L. J. Ch. 177. As to "ornamental" timber, see *Williams v. M'Namara*, 8 Ves. 70; and *Coffin v. Coffin*, Jacob. 70.

(*m*) See Jud. Act, 1873, s. 25 (2).

DIVISION II.—DUTIES OF LANDLORD.

As we have seen, the duties of the tenant are chiefly—first, to pay rent ; and, secondly, to refrain from committing waste, or damaging the property by neglect. Upon the other hand, the duties of the landlord are—first, to give possession during the term, and to enable his tenant peaceably and quietly to enjoy the property without disturbance ; secondly, in certain cases to grant a lease ; thirdly, in certain cases to repair the premises ; and fourthly, duties with respect to game.

CHAPTER I.

DUTY TO GIVE UNDISTURBED POSSESSION.

THE subject of quiet enjoyment is treated of *ante*, pp. 93–102, Possession and quiet enjoyment, as far as relates to covenants, whether implied or expressed, as well as to breaches of such covenants.

With respect to the duty to give possession, it only remains to be said, that in *Messent v. Reynolds* (a), it was doubted whether a contract for quiet enjoyment could be implied from a mere agreement to let ; but in *Coe v. Clay* it was held that he who lets agrees to give possession, and not merely to give a chance of a lawsuit, so that the lessees may recover damages for a breach of such agreement, and is not left to a remedy by ejectment (b).

SECTION I.

HOW ENFORCED.

For the breach of covenants for quiet enjoyment, where the lease was under seal, an action of covenant would lie (c). Remedies for disturbance.

(a) 3 C. B. 194.

(b) 5 Bing. 440; *Jinks v. Edwards*,

11 Ex. 775. See *Hawkes v. Orton*, 5 A. & E. 367; and see *Locke v.*

Furze, 19 C. B. N.S. 96, L. R. 1 C.

P. 441, 34 L. J. C. P. 201, 35 Id. 141.

(c) *Dawson v. Dyer*, 5 B. & Ad. 584.

CHAP. I. § 1. If the demise was not under seal, and there was an express agreement for quiet enjoyment, the tenant upon breach might bring *assumpsit* (*d*) or case (*e*).

In cases of implied contract of indemnity against distress, the proper form of remedy is an action of tort (*f*).

With respect to the damages for a breach of a covenant for quiet enjoyment, where the lessor had not power to grant the lease, but the tenant obtained a fresh lease of less value from the person having power, it was held that the tenant was entitled to be indemnified for his loss by breach of the covenant, and therefore, in this case, to the difference in value of the void lease and of the valid lease (*g*).

The tenant may also have a remedy by injunction (*h*). The Court will restrain a landlord from cutting down ornamental trees which he has allowed the tenant to plant (*i*), or which he has impliedly assured to the tenant (*j*); so the tenant may restrain the landlord from committing a nuisance (*k*), obstructing lights (*l*), or a sea view, contrary to agreement (*m*), and in many other cases.

So also the Court will grant an injunction to restrain proceedings in ejectment in certain cases (*n*).

(*d*) *Granger v. Collins*, 6 M. & W. 458; *Hancock v. Caffyn*, 8 Bing. 358.

(*e*) *Burnet v. Lynch*, 8 D. & R. 368; *Hancock v. Caffyn*, *supra*.

(*f*) *Hancock v. Caffyn*, *supra*.
(*g*) *Locke v. Furze*, *ante*, p. 187, note (b). See *Rolph v. Crouch*, L. R. 3 Ex. 44, 37 L. J. Ex. 8.

(*h*) As to Injunction, see *ante*, p. 184.

(*i*) *Jackson v. Cator*, 5 Ves. 688.

(*j*) *Nicholson v. Rose*, 4 De Gex & J. 10.

(*k*) *Tipping v. Eckersley*, 2 Kay & J. 264; *Lingwood v. Stowmarket Co. L. R.* 1 Eq. 77.

(*l*) *Fox v. Purcell*, 3 Sm. & Giff. 242.

(*m*) *Piggott v. Stratford*, 1 De Gex F. & J. 33, 44.

(*n*) *Neave v. Avery*, 16 C. B. 328; *Job v. Banister*, 2 Kay & J. 374; *Pain v. Coombs*, 3 Sm. & Giff. 449; 1 De Gex. & J. 34; *Lilley v. Leigh*, 3 De Gex. & J. 204; *Morris v. Rhydydefed Coll. Co.*, 3 H. & N. 885; 28 L. J. Ex. 119. In cases of ejectment for non-payment of rent proceedings may summarily be stayed, see 15 & 16 Vict. c. 76, s. 212, 23 & 24 Vict. c. 126 (C. L. P. A.), s. 1, *post*, pp. 203, 204. Part III.

CHAPTER II.

DUTY TO GRANT A LEASE.

SOMEWHAT akin to the right of the tenant to have the peace- Right to a lease.
 able enjoyment of his property, is his right to compel his
 landlord, under certain circumstances, to grant him a lease.
 Thus, if the landlord covenant or agree in writing to grant a
 lease, the Court of Chancery will decree specific performance
 of the agreement (a).

So also where the tenant is in possession under a mere
 oral agreement for a lease, and has been permitted by the
 landlord to expend money on the faith of a contract, in
 reasonable pursuance of such contract, he will be entitled to
 have a lease granted to him (b); but if the expenditure be
 merely such as is incidental to his oral agreement—as, for
 instance, in the ordinary course of husbandry—he would not
 be entitled to have a lease granted to him (c). There
 must be a part performance of the oral contract sufficient
 to take it out of the Statute of Frauds. It has been
 said that mere possession is not a sufficient part perform-

(a) *Martin v. Pycroft*, 2 De G. M. & G. 798; *Rankin v. Lay*, 29 L. J. Ch. 734; *Parker v. Taswell*, 27 ib. 812; *Middleton v. Greenwood*, 2 De G. J. & S. 142. This is within the exclusive jurisdiction of the Court of Chancery, see Jud. Act, 1873, s. 34.

(b) *Powell v. Thomas*, 6 Hare, 304; *Pain v. Coombs*, 3 Sm. & G. 464; *Nunn v. Fabian*, L. R. 1 Ch. 35; *Farrall v. Davenport*, 3 Giff. 363; *Wills v. Stradling*, 3 Ves. 378; *Stockley v. Stockley*, 1 V. & B. 23; *Sutherland v. Briggs*, 1 Hare, 26; *Surcombe v. Pinniger*, 3 De G. M. & G. 571; *Price v. Salusbury*, 32 Beav. 446. And see *Frame v. Dawson*, 14 Ves. 380; *Lindsay v. Inch*, 2 Sch. & Lef. 1. Where letters had passed between the parties which merely raised ground for believing there was an agreement for a lease but did not show the contract itself, and the tenant who had expended money could not therefore by reason of the Statute of Frauds recover damages for not having a lease granted, it was held, nevertheless, that he might recover for work done at the landlord's request. *Pullbrook v. Lawes*, 45 L. J. Q. B. 178 L. R. 1 Q. B. D. 284.

(c) *Brennan v. Bolton*, 2 Dru. & W. 349; *Faulkner v. Llewellyn*, 31 L. J. Ch. 549; *Gunter v. Halsey*, Amb. 586; *ex parte Hooper*, 19 Ves. 479.

CHAP. II. § 1. ance (*d*), but it would rather seem that it is (*e*). So also where an increased rent was paid in pursuance of an oral agreement, it was held that this constituted a part performance (*f*). Possession after the expiration of a lease has been held a sufficient part performance of an oral agreement for renewal (*g*), but it seems doubtful whether, where possession is first taken and then a parol agreement is made, the continuance in possession is a part performance (*h*). Even where possession is obtained without authority, yet an agreement will be decreed to be specifically performed (*i*).

Where there was an understanding between the landlord and tenant that, so long as the tenant was a good customer in using a canal, he should have the use of the waste water for his works, it was held that he was not entitled to a decree for specific performance of such understanding; but if the water was essential, or anything like essential, to the works, he might have been entitled to a decree (*j*).

SECTION I.

HOW ENFORCED.

The duty which the landlord owes to the tenant to grant him a lease will be enforced by specific performance (*k*).

It is no answer to an action for not granting a lease that the intended lessee had not prepared the lease and tendered it for execution to the intended lessor (*l*).

- | | |
|--------------------------------------------|----------------------------------------------------|
| (<i>d</i>) Woodf. L. & T. p. 944. | (<i>h</i>) Pain v. Coombs, <i>supra</i> . |
| (<i>e</i>) Pain v. Coombs, 3 Sm. & Giff. | (<i>i</i>) Shillibeer v. Jarvis, 8 De Gex. |
| 449, 1 De Gex. & J. 34; Miller v. | M. & G. 79. |
| Finlay, 5 L. T. N.S. 510; Coles v. | (<i>j</i>) Bankark v. Tennant, L. R. |
| Pilkington, L. R. 19 Eq. 174. | 10 Eq. 141, 39 L. J. Ch. 809. |
| (<i>f</i>) Nunn v. Fabian, L. R. 1 Ch. | (<i>k</i>) See the cases cited, <i>ante</i> , p. |
| 35, 35 L. J. Ch. 140. | 189, notes (a), (b). |
| (<i>g</i>) Dowell v. Dew, 1 Y. & C. co. | (<i>l</i>) Cantley v. Powell, 10 Ir. C. L. |
| 345. | 200 Q. B. |

CHAPTER III.

DUTY TO REPAIR.

THE duty to repair necessarily arises out of the relation existing between the parties, but such duty devolves, as we have seen, upon the tenant, and the landlord is not bound to repair, unless he expressly agrees or covenants to do so (a); but if he does covenant to repair, the tenant may sue him for a breach of such covenant. If the landlord covenants to put the premises in repair and the tenant to keep them in repair, the putting of the premises in repair by the landlord is a condition precedent by the tenant's liability (b). There can be only one breach of this covenant, but where the covenant is to maintain in repair, there may be a continuing breach (c).

A landlord is not bound to repair the fence which separates land which he holds from land which he has leased (d).

Nor where he has covenanted to keep in repair the "main walls, main timbers and roofs," is he bound to repair the main timbers and roofs without notice; although as to outside walls, it seems he must repair them without notice (e).

A landlord who had covenanted to keep the premises in good and substantial repair was held not to be bound to cleanse a piece of ornamental water upon the premises (f).

SECTION I.

HOW ENFORCED.

THE duty of the landlord to repair may be enforced in the same manner as the duty of the tenant to repair is enforced by his landlord, viz, by action (g). See *ante*, p. 180.

- (a) *Golt v. Gaudy*, 2 El. & B. 845.
 (b) *Neale v. Ratcliffe*, 15 Q. B. 916; *Cannock v. Jones*, 3 Exch. 233; *Coward v. Gregory*, L. R. 2 C. P. 153, 36 L. J. C. P. 1.
 (c) *Coward v. Gregory*, *supra*.
 (d) *Erskine v. Adlane*, 42 L. J. Ch. 835; L. R. 8 Ch. 756.
 (e) *Makin v. Watkinson*, L. R. 6 Ex. 25, 40 L. J. Ex. 33. *per Bram-*
well & Channell, B.B.; *Martin, B. diss.* See *Moon v. Clark*, 5 Taunt. 90, 96; as to party-walls, see *Green v. Eales*, 2 Q. B. 225.
 (f) *Bird v. Elwes*, L. R. 3 Ex. 225, 37 L. J. Ex. 91.
 (g) *Coward v. Gregory*, *supra*; *Neale v. Ratcliffe*, *supra*; *Cannock v. Jones*, *supra*; *Makin v. Watkinson*, *supra*.

CHAPTER IV.

DUTIES WITH RESPECT TO GAME.

As we have seen, *ante*, p. 61, where there has been no special arrangement made between the landlord and his tenant with respect to the game, the tenant has a right to kill the game and other wild animals upon the farm. The right of sporting is, however, frequently reserved by the landlord, who takes upon himself certain duties and liabilities which the tenant may compel him to perform.

Where the exclusive right of shooting is reserved the tenant cannot even kill rabbits (*a*).

Where a person having a license to shoot over land does so in an unreasonable manner and at an unreasonable season, he is liable to an action by the tenant (*b*).

The tenant can arrest trespassers in search of game whether the game belongs to him or not (*c*).

Although damage might be done to the crops by the game, yet the tenant had no right of action, except in Scotland, where, if the game was unreasonably excessive, he had a right to an action (*d*). Where a tenant had declined to take a farm because of the quantity of game, and the lessor thereupon promised to keep down the game, although he would not allow the promise to be inserted in the lease, which

(*a*) *Jeffreys v. Evans*, 19 C. B. N. S. 264; 34 L. J. C. P. 261; but he is not liable to a conviction for so doing under the 1 & 2 Will. IV. c. 32, s. 30.

(*b*) *Hilton v. Green*, 2 F. & F. 821. A person may justify trespass in following a fox with hounds over the grounds of another if he do no more than is necessary to kill the fox. *Gundry v. Feltham*, 1 T. R. 334. The demurrer admitted that this

was the only means of killing the fox. Generally speaking, one who finds game on his own land cannot justify pursuing it into the land of another, *Deane v. Clayton*, 7 Taunt. 489.

(*c*) 1 & 2 Will. IV. c. 32, s. 31; 9 Geo. IV. c. 69, s. 2; 25 & 26 Vict. c. 114; 24 & 25 Vict. c. 96, s. 17.

(*d*) *Paterson on Game Laws*, 14.

contained a reservation of the right to kill game, it was held that there was a binding collateral agreement to keep down the game, and that the tenant was entitled to compensation for breach of the agreement (e).

A person having a licence to shoot over a farm has no right to turn out rabbits upon the farm without leave, but is liable for the damage which is done by them (f).

(e) *Erskine v. Adeane*, 8 L. R. Ch. 756, 42 L. J. Ch. 849; see Stephen's Digest of Ev. pp. 89, 90; for another agreement to keep down rabbits or to pay compensation, see *Dawson v. Fitzgerald*, 45 L. J. App. 894. The case turned upon whether the stipulation as to compensation and another as to arbitration were joint or distinct.

(f) *Hilton v. Green*, 2 F. & F. 321.

PART III.

DETERMINATION OF TENANCY.

CHAPTER I.

EFFLUXION OF TIME.

Effluxion of
time.

WHEN the lease is for a term of years certain, the tenancy is determined upon the expiration of the term, and the landlord is entitled to possession. Should the tenant hold over, he becomes a tenant on sufferance; or should there be any circumstances, such as the payment and acceptance of rent, indicating an intention to create a yearly tenancy, he will be a tenant from year to year, upon such of the terms of the original lease as are applicable to such a tenancy (*a*).

Where the term is limited conditionally upon the happening of some event, the term will cease at the expiration of the time, or on the happening of the event (*b*). But "if a house be letten to one to hold at will, by force whereof the lessee entereth into the house, and brings his household stuff into the same, and after the lessor puts him out, yet he shall have free entry, egress, and regress into the said house, by reasonable time to take away his goods and utensils" (*c*). And a stipulation in a weekly tenancy that, after the expiration of the tenancy, the tenant should have a reasonable time to remove his goods, has been held to be good (*d*).

(*a*) *Doe d. Hollingworth v. Stennett*, 2 Esp. 717; *Bishop v. Howard*, 2 B. & C. 100; *Doe d. Thomson v. Amey*, 12 A. & E. 746; *Hyatt v. Griffiths*, 17 Q. B. 505. It is a question for the jury, see *Vance v. Vance*, 5 Ir. R. C. L. 363; *Caulfield v. Farr*, 7 Ir. R. C. L. 469.

(*b*) *Hughes & Crowther's case*, 13 Co. R. 66; *Brudnell's case*, 5 Co. R. 9; *Doe d. Lockwood v. Clarke*, 8 East. 185.

(*c*) *Litt. s. 69*, Co. Litt. 56 a.
(*d*) *Cornish v. Stubbs*, L. R. 5 C. P. 334, 39 L. J. C. P. 202.

CHAPTER II.

SURRENDER.

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1. EXPRESS AT COMMON LAW, AND SINCE THE STATUTE OF FRAUDS.

A SURRENDER is the yielding up an estate for life, or years, to him who has the immediate estate in reversion or remainder, either in fee or for any less estate (a), and may be either in express terms, that is, by deed, or note in writing, signed by the party surrendering, or his agent thereunto lawfully authorised by writing, or by act and operation of law (b). The surrender, if made after the first day of October 1845, must be by deed, unless the interest surrendered is copyhold, or of such a nature that it could by law have been created without writing (c), in which cases the surrender may be in writing. Where the term could not have been created except by deed, it cannot be otherwise surrendered, unless indeed it be surrendered by the operation of law (d).

Express at com
mon law, and,
since the
Statute of
Frauds.

In order to effect an express surrender, the surrenderor must have an estate in possession at the time of the surrender. There can be no express surrender, therefore, before entry, for the lessee has not the possession until he has entered. His assignee, however, can surrender without actual entry, for the entry of the lessee severs the possession from the rever-

Who may
surrender.

(a) Com. Dig. Surrender (H); Bac. Abr. Leases, (S) 1-3; Co. Litt. 337; Challoner v. Davis, 1 Lord Raymond, 402; Hughes v. Rowbotham, Cro. Eliz. 302.

(b) 29 Car. II. c. 3. s. 3.
(c) 8 & 9 Vict. c. 106, s. 3; Wms. Saund. 236 c. note (n).
(d) Cole Eject. 225; M'Garth v. Shannon, 17 Ir. Com. L. R. 128.

CHAP. II.

sion, and the assignment transfers it to the assignee (*e*). It is otherwise with a surrender in law. If, therefore, the lessee takes a second lease before the first has commenced, this will operate as a surrender in law of the first lease (*f*).

To whom the
surrender may
be made.

A surrender can only be made to him who has the immediate reversion or remainder expectant on the interest to be surrendered, and consequently there must be no intervening interest between the term to be surrendered and the estate of the surrenderee, which must also be of a higher and greater nature than the interest of the surrenderor. It is also necessary that there should be a privity of estate between the surrenderor and surrenderee, who must have the estate in his own right and not in that of another, and be seized solely and not as joint-tenant (*g*).

In what words
the surrender
should be made.

The words most commonly used in surrenders are "surrender and yield up;" but any words expressing an immediate intention of giving up the estate, if accepted by the landlord, will be sufficient (*h*). The Court, however, will not construe an informal document as a surrender where there is no intention to surrender at all (*i*), or where there is merely an intention to surrender upon a condition which has not been performed (*j*). A voluntary surrender does not affect the rights of a sub-tenant, nor will his knowledge of it be equivalent to a notice to quit (*k*).

2. SURRENDER BY OPERATION OF LAW.

Taking a new
lease.

A surrender by operation of law is where the lessee, with some object other than that of surrendering his lease, is party to some act which cannot be effected while the lease continues, and the validity of which he is estopped from disputing (*l*). If, therefore, the tenant accept a new lease, to

(*e*) Bac. Abr. Leases, (S), 2.

(*f*) Shep. Touch. 302; *Jez v. Sams*, Cro. Eliz. 521; *Hutchins v. Martin*, Cro. Eliz. 605.

(*g*) Shep. Touch. 303; 2 Black. Com. 336. See, however, Shep. Touch. 308.

(*h*) *Farmer v. Rogers*, 2 Wils. 26; *Smith v. Mapleback*, 1 T. R. 441; *Weddall v. Copes*, 1 M. & W. 50; Shep. Touch. 306; *Lloyd v. Langford*, 2 Mod. 175; *Williams v. Sawyer*, 3 Brod. & Bing. 70; *Parmenter v. Webber*, 8 Taunt. 593;

Doe d. Wyatt v. Stagg, 5 Bing. N. C. 564.

(*i*) *Lyon v. Reed*, 13 M. & W. 285; *Doe d. Murrell v. Milward*, 3 M. & W. 328; *Bessell v. Landsberg*, 7 Q. B. 638; *Weddall v. Copes*, 1 M. & W. 50.

(*j*) *Coupland v. Maynard*, 12 East. 134.

(*k*) *Mellor v. Watkins*, L. R. 9 Q. B. 400.

(*l*) *Lyon v. Reed*, 13 M. & W. 285; *Bessell v. Landsberg*, 7 Q. B. 368; Com. Dig. Surrender (1); 20 Vin. Abr. Surrender (F), (G).

take effect during the continuance of a previous lease, this is a surrender in law of the latter lease, for the two leases are incompatible, and the acceptance of the second shows that the lessee contemplated the destruction of the first (*m*). There must, however, be an actual and valid demise. A mere agreement for a lease (*n*), and *a fortiori* an agreement between the lessor and a stranger that the lessee shall have a new lease (*o*), or a void or voidable lease (*p*), will not operate as a surrender of the subsisting lease, nor will the acceptance of a new lease by the lessee in trust for another (*q*). If the new lease is for part only of the land included in the old, the old lease will be surrendered as to that part, but will continue to exist as to the residue (*r*).

If there be two lessees, and one take a new lease, it is a surrender of his moiety (*s*).

The new lease must also take effect during the continuance of the old lease (*t*), for if the new lease is not to begin until the happening of some future event, it will not operate as a surrender of the first lease until the event takes place (*u*).

A surrender will also be effected where the tenant accepts Other acts. some interest in the property demised inconsistent with the existence of the lease, as a grant of common or rent, provided always that such interest commences during the term (*v*). It is otherwise, however, if the grant is consistent with the continuance of the lease (*w*). Not only the acceptance of a new lease by the lessee, but the granting of a new lease by

(*m*) *Davidson d. Bromley v. Stanley*, 4 Burr. 2110; *Crowley v. Vitty*, 7 Ex. 319, 21 L. J. Ex. 136; *Furnivall v. Grove*, 8 C. B. N.S. 96, 304 L. J. C. P. 3; *Roll. Abr. Surrender*.

(*n*) *John v. Jenkins*, 1 Cr. & M. 227; *Foquet v. Moore*, 7 Ex. 870; *Cannon v. Hartley*, 9 C. B. 634, 19 L. J. C. P. 323; *Badeley v. Vigurs*, 23 L. J. Q. B. 297.

(*o*) *Porris v. Allen*, Cro. Eliz. 173.

(*p*) *Zouch d. Abbot v. Parsons*, 3 Burr. 1807; *Wilson v. Sewell*, 4 Burr. 1980, 1 W. Blac. 617; *Roe d. Earl Berkeley v. Archbishop of York*, 6 East. 86, 2 Smith, 166; *Davidson d. Bromley v. Stanley*, 4 Burr. 2210, Com. Dig. Estate, (G) 13; *Doe d. Biddulph v. Poole*, 11 Q. B. 713; *Doe d. Earl Egremont v. Courtenay*, 11 Q. B. 702. See,

however, *Doe d. Murray v. Bridges*, 1 B. & Ad. 847.

(*q*) Com. Dig. Surrender, (H, L) 1.

(*r*) *Earl of Carnarvon v. Villibois*, 13 M. & W. 342; *per Alderson*, B. *Morrison v. Chadwick*, 7 C. B. 266, *Bac. Abr. Leases*, (D) 3.

(*s*) *Shep. Touch.* 302.

(*t*) *Ive v. Sams*, Cro. Eliz. 522; *Hutchins v. Martin*, Cro. Eliz. 604.

(*u*) *Bac. Abr. Leases*, (S) 53; *Doe d. Gray v. Stanion*, 1 M. & W. 695; *Juste v. Darby*, 15 M. & W. 601.

(*v*) *Gybson v. Searle*, Cro. Jac. 84, 177; Com. Dig. Surrender, (J) 1; *Mellows v. May*, Cro. Eliz. 874; *Peter v. Kendal*, 6 B. & C. 703.

(*w*) *Gie v. Rider*, 1 Sid. 75; *Earl of Arundel v. Lord Gray*, 2 Dyer, 200 b; *Woodward v. Aston*, 1 Ventr. 296.

CHAP II.

the lessor to a stranger, or to the old tenant and a stranger (x), with the assent of the lessee, will operate as a surrender of the old lease (y), and so will an agreement by the landlord to accept a third person in the place of the tenant, provided the agreement is in writing, or the third person actually takes possession (z). But the mere quitting by the tenant with the assent of the landlord will not (a) unless the lessor accepts possession (b).

A lease for years may be determined by merger, that is, by the union of the term with the immediate reversion (c), both being vested (d) in one person at the same time and in the same right (e). Where the particular estate and that in immediate reversion are both legal and both equitable, and they become vested in one person, they will merge; but it seems that the conveyance of the reversion in fee to a trustee expressly to avoid the merger will have the effect of preventing a merger (f). In order to effect a merger, it is not necessary that the reversion should be of a duration greater than or even equal to that of the term merged (g). With respect to estates not vested in the same right, it appears to have been thought by Lord Coke (h) that a man might have a term of years in *autre droit*, and a freehold in his own right, but that he could not by possibility have a term of years in his own right and a freehold in *autre droit* to consist together. The latter position, however, cannot be maintained after the decision in *Platt v. Sleep* (i), and *Jones v. Davies* (j), in

(x) *Hamerton v. Stead*, 3 B. & C. 478.

(y) *Nickells v. Atherstone*, 10 Q. B. 944; *Walls v. Atcheson*, 3 Bing. 462; *Davison v. Gent*, 1 H. & N. 744, 26 L. J. Ex. 122; *Thomas v. Cook*, 2 B. & Ad. 119; *Wilson v. Sewell*, 4 Burr. 1975; *Hall v. Burgess*, 5 B. & C. 332; *Woodcock v. Nuth*, 8 Bing. 170; *Bees v. Williams*, 2 C. M. & R. 581; *Lyon v. Reid*, 13 M. & W. 285; *Phipps v. Sculthorpe*, 1 B. & A. 50; *Hyde v. Moakes*, 5 C. & P. 42.

(z) *Taylor v. Chapman*, Peake, Add. Cas. 19; *Stone v. Whiting*, 2 Stark, 235; *Nickells v. Atherstone*, 10 Q. B. 944; *Walker v. Richardson*, 2 M. & W. 882.

(a) *Mollett v. Brayne*, 2 Camp. 103; *Thompson v. Stark*, 2 Stark, 379; *Doe d. Huddleston v. Johnson*, 1 M'Clel. & G. 141; *Johnson v. Huddleston*, 4 B. & C. 922; *Doe d. Murrell v. Milward*, 3 M. & W. 328;

Cannan v. Hartley, 9 C. B. 634, 19 L. J. C. P. 323.

(b) *Bac. Abr. Leases*, 211; *Grimman v. Legge*, 8 B. & C. 324; *Brown v. Burtinshaw*, 7 D. & R. 603; *Furnivall v. Grove*, 8 C. B. N.S. 496, 30 L. J. C. P. 3; *Reeve v. Bird*, 1 C. M. & R. 31; *Dodd v. Acklom*, 6 M. & G. 672.

(c) *Burton v. Barclay*, 7 Bing. 745.

(d) Vested, that is, in estate; a mere *interesse termini* will not merge in the freehold. *Doe d. Rawlings v. Walker*, 5 B. & C. 111.

(e) *Bac. Abr. Leases* (R); *Salmon v. Swan*, Cro. Jac. 619.

(f) *Belaney v. Belaney*, L. R. 2 Ch. Ap. 138, 36 L. J. Ch. 265.

(g) *Hughes v. Rowbotham*, Cro. Eliz. 302, Poph. 30; *Stephens v. Bridgea*, 6 Madd. 66.

(h) Co. Litt. 338 b.

(i) Cro. Jac. 275.

(j) 5 H. & N. 766, S. C.; on appeal, 7 H. & N. 507.

which it was held that the husband being termor, and the fee descending upon or being devised to his wife, there was no merger. A distinction has been drawn, in the case of estates in different rights, between cases in which the second estate is acquired by the act of the husband himself, and those in which it comes to him without any act on his part; and it has been contended that in the former class of cases a merger took place in law though not in equity (*k*). In *Lishden v. Winsmore* (*l*), however, it was said—though no decision was finally had upon it—that where the lessee granted his estate to the husband of the reversioner, the two estates did not merge, as the husband held them in different rights—the term in his own right, and the reversion in right of his wife. Whichever may be the true opinion, it is clear that neither in the case of a devise of the fee to the wife of the termor (*m*), nor in that of the marriage of the man seized of the freehold with the lessee (*n*), is there such an act on the part of the husband as to cause a merger of the term. Whether a termor, who is also tenant by the courtesy after the death of his wife, holds both estates in his own right so as to cause a merger, has not been decided; but it has been held that, at any rate, during the life of the wife, the tenancy by the courtesy initiate is not such an estate, or is not held in such a right, as will merge a term possessed by the husband in his own right (*o*).

3. EFFECT OF A SURRENDER ON UNDER-LEASES.

The surrender of a lease will not prejudice an under-lease (*p*), or any other interest or right created by the lessee before the surrender—as, for instance, a mortgage of the tenant's fixtures (*q*). Formerly, if a lessee who had created an under-lease surrendered his term, the reversion on the

Effect of a surrender.

(*k*) *Shep. Touch.* p. 303, note (*a*); *Cruise Dig.* tit. xxxix. Merger, s. 49, p. 53; *Webb v. Russell*, 3 T. R. 393. There is now, however, no merger in law where there would be none in equity. See *Jud. Act*, 1873, sect. 25, sub-sect. 4.

(*l*) 2 *Roll. Rep.* 472. See also the opinion of Lord Holt in *Gage v. Acton*, 1 *Salk.* 326, and of Hobart, C.J. in *Young v. Bradfroot*, *Hob.*; and the case of *Jones v. Davies*, 5 H. & N. 777.

(*m*) *Jones v. Davies*, 5 H. & N. 766.

(*n*) *Bracebridge v. Cook*, *Plow. Com.* 417.

(*o*) *Jones v. Davies*, 5 X. & N. 766, 29 L. J. Ex. 374.

(*p*) *Doe d. Beaden v. Pyke*, 5 M. & S. 146; *Pleasant v. Benson*, 14 East. 232; *Torriano v. Young*, 6 Car. & P. 8; *Pigott v. Stratton*, 1 De G. F. & J. 44, 29 L. J. Ch. 1. 8. Where a lessor accepts a surrender the rights of the under-lessees remain, even although the lessee was at the time liable to forfeiture; *Gt. W. Ry. Co. v. Smith*, L. R. 2 Ch. D. 235, C. A.

(*q*) *London and Westminster Loan and Discount Co. Limited v. Drake*, 6 C. B. N.S. 798; *Saint v. Pilley*, 44 L. J. Ex. 33, L. R. 10 Ex. 137.

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under-lease being gone, the rent reserved and the covenants contained in the under-lease were gone also (*r*). This inconvenience was remedied by the 4 Geo. II. c. 28, s. 6; and now by the 8 & 9 Vict. c. 106, s. 9, if a reversion expectant on a lease is surrendered, the estate which confers, as against the tenant, the next vested right to the tenement, shall be deemed the reversion for the purpose of preserving the incidents to, and obligations on, the reversion.

By the surrender, the lease, with all its incidents, is entirely gone, so that no action can be maintained for rent previously due, except where there is a personal covenant for its payment, in which case an action may be brought on the covenant (*s*). Rent accruing at the time the surrender is made is entirely lost (*t*).

Operation of
merger.

The operation of a merger was similar to that of a surrender (*u*), and was similarly remedied by the 8 & 9 Vict. c. 106, s. 9 (*v*).

(*r*) *Shep. Touch.* 301; *Threr v. Barton, Moor.* 94; *Webb v. Russell*, 3 T. R. 393; *Burton v. Barclay*, 7 Bing. 756.

(*s*) *Att.-Gen. v. Cox*, 3 H. L. Cas. 240.

(*t*) *Grimman v. Legge*, 8 B. & C. 324; *Slack v. Sharp*, 8 A. & E. 366;

Dodd v. Acklom, 6 M. & G. 973; *Doe d. Philip v. Benjamin*, 9 A. & E. 644; *Furnivall v. Grove*, 8 C. B. N.S. 496.

(*u*) *Webb v. Russell*, 3 T. R. 393; *Thorne v. Woolcombe*, 3 B. & Ad. 586.

(*v*) *Supra*.

CHAPTER III.

FORFEITURE.

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1. RE-ENTRY.

A LEASE may be determined by entry or ejectment for a forfeiture incurred by breach of an express or implied condition, but not for a mere breach of covenant without proviso for re-entry (*a*). If the tenant do any act unequivocally (*b*) inconsistent with his character as tenant (*c*); as if, being tenant for years, he make a feoffment, or give up possession to a party claiming an adverse title to the lessor (*d*); or if he be guilty of a breach of any express condition in the lease, a forfeiture will be incurred for which the landlord may enter (*e*). Re-entry for.

As to forfeiture upon assigning or underletting and license, or breach of covenant to insure, see *ante*, Part I. c. 4, ss. 8 and 9.

In general no one can re-enter for a forfeiture but the person legally entitled to the reversion (*f*). A reversioner who has parted with his reversion, either absolutely or by way of mortgage, cannot enter or maintain ejectment for a forfeiture (*g*). But where a termor demised his whole interest, subject to a right of re-entry on the breach of a condition, it By whom.

(*a*) *Doe d. Wilson v. Phillips*, 12 East. 444; *Goodright d. Walters v. Davids*, Cowp. 803.
 2 Bing. 13; *Doe d. Rudd v. Golding*, 6 Moo. 231; *Doe d. Rains v. Kneller*, 4 C. & P. 3; *Doe d. Darke v. Bowditch*, 8 Q. B. 973.

(*b*) See *Ackland v. Lutley*, 9 A. & E. 879.

(*c*) *Bac. Abr. Leases*, (T) 2, Co. Litt. 215 a.

(*d*) *Doe d. Ellerbroch v. Flynn*, 1 C. M. & N. 137.

(*e*) *Rees v. Ervington*, Cro. Eliz. 322; *Fenn d. Matthews, v. Smart*,

(*f*) *Doe d. Barney v. Adams, C. & J.* 232; *Doe d. Barker v. Goldsmith*, 2 C. & J. 674; *Doe d. Barber v. Lawrence*, 4 Taunt. 23, Litt. s. 347, Co. Litt. 414 b; *Moore v. Earl of Plymouth*, 3 B. & Ald. 66.

(*g*) *Fenn d. Matthews v. Smart*, 12 East. 443; *Doe d. Marriott v. Edwards*, 5 B. & Ad. 1065; *Doe d. Price v. Ongley*, 10 C. B. 25; *Webb v. Russell*, 3 T. R. 393, 402.

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was held that he might enter for the condition broken, although he had no reversion (*h*).

By the 32 Hen. VIII. c. 34, all grantees of the reversion, their heirs, executors, successors, and assigns, shall have the like advantage (as their grantors had) against the lessees by entry for non-payment of rent, or for doing waste or other forfeiture.

As to the construction of this Act, see *infra*, Part 4, "Change of Parties," c. 1, s. 3.

In order to make an effectual re-entry for a forfeiture, the lessor must do some act showing an intention to enter for the forfeiture (*i*); and where he brings ejectment for a forfeiture, the onus of proving the forfeiture lies upon him (*j*).

By an entry of the lessor, or any other unequivocal act on his part, showing an intention to determine the lease (*k*), or by an entry of any one claiming through the lessor (*l*), the rent is suspended, and such eviction becomes a bar to the recovery of subsequently accruing rent (*m*), but not if he enters under a power of re-entry, or even as a mere trespasser where there is no eviction (*n*). What amounts to an eviction is a question for the jury (*o*).

Entry and eviction by a landlord upon a part of the premises suspends the entire rent (*p*), but it does not put an end to the tenancy in other respects (*q*).

(*h*) *Doe d. Freeman v. Bateman*, 2 B. & Ald. 168. Litt. s. 325.

(*i*) *Fenn d. Matthews v. Smart*, 12 East. 444, 451; *Arnsby v. Woodward*, 6 B. & C. 519; *Roberts v. Davey*, 4 B. & Ad. 664; *Baylis v. Le Gros*, 4 O. B. N.S. 537, 6 Id. 552.

(*j*) *Doe d. Bridger v. Whitehead*, 8 A. & E. 571; *Toleman v. Portbury*, L. R. 5 Q. B. Ex. Ch. 288, 39 L. J. Q. B. 136.

(*k*) *Jones v. Carter*, 15 M. & W. 718; *Upton v. Townend*, 17 C. B. 30, as, for instance, by issuing a writ in ejectment. *Birch v. Wright*, 1 T. R. 378; *Bridges v. Smyth*, 5 Bing. 470; *Burn v. Phelps*, 1 Stark R. 94.

(*l*) *Cuthbertson v. Irving*, 6 H. & N. 135; 28 L. J. Ex. 306.

(*m*) *Morrison v. Chadwick*, 7 C.

B. 266; *Boodle v. Cambell*, 7 M. & G. 386.

(*n*) *Hunt v. Cope*, 1 Cowp. 242, Bull. N. P. 165, 177; *Paradise v. Jane*, Aleyn, 26.

(*o*) *Hunt v. Cope*, *supra*; *Upton v. Townend*, 17 C. B. 30; *Henderson v. Mears*, 28 L. J. Q. B. 305. There must, it seems, be an actual eviction, not a mere assertion of right, and attornment of the tenant, for this might lead to collusion. *Delaney v. Fox*, 2 C. B. N.S. 768.

(*p*) *Morrison v. Chadwick*, 7 C. B. 266.

(*q*) *Newton v. Allin*, 1 Q. B. 518, and if the demise is by parol a tenant will be liable for use and occupation of the residue retained by him. *Stokes v. Cooper*, 3 Camp. 514 n.

If the tenant continues in possession after the eviction he is a wrong-doer, and is liable for mesne profits, but not for rent as such (r).

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The effect of re-entry for a forfeiture is to destroy the rights of the under-lessees (s).

Where there is a condition of re-entry upon non-payment of the rent, the landlord must make a formal demand, unless there are express words in the lease or agreement dispensing with such demand (t), or the case falls within 15 & 16 Vict. c. 76, s. 210 (u). 1. Such demand must be made by the landlord or his agent duly authorised (v). 2. It must be made precisely on the day when the rent is due and payable. Thus where the proviso is that if the rent shall be behind and unpaid by the space of thirty days after the day of payment, it shall be lawful for the lessor to re-enter, the demand must be made on the thirtieth day (w). 3. The demand must be made a convenient time before sunset (x). 4. It must be made at the most notorious place on the land (y); or if a place is appointed for the payment of the rent, it must be made there (z). 5. It must be of the precise sum then payable (a).

For non-payment of rent.

By the 15 & 16 Vict. c. 76, s. 210 (b), a formal demand of the rent is unnecessary when one half-year's rent is in arrear, and the landlord hath by law right to re-enter for the

(r) *Oldershaw v. Holt*, 12 A. & E. 590.

(s) *Great Western Ry. Co. v. Smith*, L. R. 3 Ch. Div. 235, C. A.; *Arnsby v. Woodward*, 6 B. & C. 519.

(t) See *Doe d. Harris v. Masters*, 2 B. & C. 490. "Where a right of entry is given by a collateral clause in a lease upon the expiration of a notice, and the entry is not for breaches of covenants, no actual entry is required, but ejectment may be brought without entry. *Liddy v. Kennedy*, L. R. 5 H. L. C. 155.

(u) See *infra*.

(v) *Roe d. West v. Davis*, 7 East. 363; *Toms v. Wilson*, 32 L. J. Q. B. 33 *Id.* 382.

(w) *Doe d. Dixon v. Roe*, 7 C. B. 134; *Doe d. Forster v. Wandlass*, 7 T. R. 117; *Smith & Bustard's case*, 1 Leon. 142; *Duppa v. Mayo*, 1 Wms. Saund. 287; *Phillips v.*

Bridge, 43 L. J. C. P. 13 L. R. 9 C. P. 48.

(x) See *ante*, p. 124; *Tinkler v. Prentice*, 4 Taunt. 555; *Doe d. Wheeldon v. Paul*, 3 C. & P. 613; *Doe d. Murray v. Brydges*, 2 D. & N. 29; *Alcocks v. Phillips*, 5 H. & N. 183.

(y) Co. Litt. 201 b; *Maunde's case*, 7 Rep. 28; *Kidwelly v. Brand*, Plowd. 70 a, b; *Scot v. Scot*, Cro. Eliz. 73; *Wood & Chiver's case*, 4 Leon. 180.

(z) Co. Litt. 202 a.

(a) *Fabian & Windsor's case*, 6 Leon. 305.

(b) Re-enacting s. 2 of 4 Geo. II. c. 28, with certain differences rendered necessary by the effect of new procedure in ejectment. On the construction of this Act, see *Doe d. Hitchings v. Lewis*, 1 Burr. 614; *Doe d. Forster v. Wandlass*, 7 T. R. 117, 1 Wms. Saund. 287 a.

CHAP. III. non-payment thereof, and when no sufficient distress is to be found in the premises countervailing the arrears then due. Where neither the value of the premises, nor the rent payable in respect of them, exceeds £50 by the year, proceedings may be taken, and possession may be recovered, in the County Court (c).

By sect. 212 proceedings could be stayed upon summary application upon payment of all arrears of rent with costs (d).

By the 23 & 24 Vict. c. 126, s. 1, relief against forfeiture can be given in a summary manner subject to appeal and subject to terms as in the Court of Chancery, and if the lessee is relieved he will hold under his old lease.

The decisions upon the earlier statute, 4 Geo. II. c. 28, s. 2, still apply in the construction to be placed on the above statutes. The 4 Geo. II. c. 28, s. 2, does not apply unless the landlord has actually a right of re-entry in respect of the non-payment of half a year's rent at the time of issuing the writ (e); nor where the right of re-entry is not absolute, as if the landlord is only to re-enter and hold the premises until the rent is satisfied (f). To proceed under these statutes, it must be proved that no sufficient distress was found on the premises (g). Therefore every part of the premises should, if possible, be searched with reasonable diligence (h). But if the tenant prevent the landlord from entering to distrain, it is not necessary to show that no sufficient distress was on the premises (i). If more than half a year's rent is due, it is sufficient to prove that there is no distress sufficient to countervail the arrears of rent (j).

2. WAIVER.

Waiver.

As the landlord must do some distinct act showing an intention to claim a forfeiture (k), so likewise, upon the other

(c) See 19 & 20 Vict. c. 108, s. 52; Stevenson, 6 H. & N. 155. See *Doe d. Haverson v. Franks*, 2 Car. & Kir. 678.

(d) And see now, Jud. Act, 1875, Order III. Rule 7.

(e) *Doe d. Dixon v. Roe*, 7 C. B. 134. See *Cotesworth v. Spokes*, 10 C. B. N.S. 103.

(f) *Doe d. Darke v. Bowditch*, 8 Q. B. 973.

(g) *Doe d. Smelt v. Fuchau*, 15 East. 286.

(h) *Rees d. Powell v. Kine*, cited in the judgment in *Smith v. Jersey*, 2 Bro. & Bing. 514; *Wheeler v.*

(i) *Doe d. Chippendale v. Dyson*, 1 Moo. & M. 77.

(j) *Cross v. Jordan*, 8 Ex. 149. But see *Doe d. Powell v. Roe*, 9 Dowl. 548; *Doe d. Gretton v. Roe*, 4 C. B. 576; and notes to *Day's Common Law Procedure Acts*, 3d edit., p. 164.

(k) See *ante*, p. 202.

hand, he must not do anything which may operate as a waiver of the forfeiture, if he wishes to determine the lease (*l*); thus he must not distrain for rent after the forfeiture (*m*); but the receipt of rent due before the happening of the forfeiture will not operate as a waiver (*n*). The receipt of rent due since the forfeiture, or the bringing of an action for it with knowledge of the forfeiture, operates as a waiver (*o*).

A statement in particulars delivered in an action in ejectment alleging a second breach of covenant in not paying rent will not operate as a waiver of a prior forfeiture in permitting a sale by auction on the premises without the landlord's consent (*p*).

Where there was a lease for life rendering rent, with a clause for re-entry on non-payment, and the lessor brought his action for rent in arrear, yet it was adjudged he might still enter for the forfeiture; for the action for the rent did not affirm the lease, because it should be intended to be brought for a duty due upon the contract; but if the lessor had distrained for the rent it would have been otherwise (*q*).

Where there was a covenant to keep in repair, and to repair three months after notice, and a clause for re-entry, the landlord gave notice, and it was held to be a waiver of the forfeiture under the general covenant to keep in repair (*r*).

An insufficient distress for rent has been said to be no bar to an entry for forfeiture (*s*), but it seems that this must be limited to cases arising under the 4 Geo. II. c. 28 (*t*), and that at common law such a distress would operate as a waiver (*u*).

(*l*) *Dendy v. Nicholl*, 4 C. B. N.S. 376, 27 L. J. C. P. 220.

(*m*) *Pellatt v. Boesey*, 31 L. n. C. P. 281; *Ward v. Day*, 4 B. & S. 337, 5 Id. 359, 32 L. J. Q. B. 254; *Doe d. Griffith v. Pritchard*, 5 B. & Ad. 765; *Cotesworth v. Spokes*, 10 C. B. N.S. 103, 30 L. J. C. P. 220.

(*n*) *Marsh v. Curteys*, Cro. Eliz. 528; *Price v. Worwood*, 4 H. & N. 512, 28 L. J. Ex. 329.

(*o*) *Anon.* 3 Salk 3; *Croft v. Lumley*, 5 E. & B. 648; 27 L. J. Q. B. 321; *Dendy v. Nicholl*, 4 C. B. N.S. 376, 27 L. J. C. P. 220.

(*p*) *Toleman v. Portbury*, 40 L. J. Q. B. Ex. Ch. 98; L. R. 7 Q. B. 348.

(*q*) *Anon.* 3 Salk. 3.

(*r*) *Doe d. Morecraft v. Meux*, 4 B. & C. 606. See also *Doe d. Rutzen v. Lewis*, 5 A. & E. 277; *Roe d. Goatley v. Paine*, 2 Camp. 520.

(*s*) *Doe d. Taylor v. Johnson*, 1 Starkey, 411; *Brewer d. Onslow v. Eaton*, 3 Doug. 233, cited in *Goodright d. Charter v. Cordwent*, 6 T. R. 220, and in *Cotesworth v. Spokes*, *supra*.

(*t*) And see the Common Law Procedure Act, 1852, s. 210.

(*u*) See *Adams on Ejectment*, p. 174, 3d edit.

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The mere receipt of subsequent rent does not of itself operate as a waiver, it is only evidence which may be rebutted of the election of the lessor not to enter for a forfeiture. The question is, whether the money is received by the lessor as rent *eo nomine* due under the lease (*v*). After the lessor has by some unequivocal act, as by bringing ejectment, expressed his election to treat the lease as void, a receipt of rent cannot operate to revive it (*w*). So also distraining for rent, due subsequently to the bringing of an action of ejectment, was held not to constitute a waiver (*x*). The receipt of rent is no waiver of a forfeiture recurring by reason of a continuing breach of covenant (*y*). A lessee covenanted not to "assign or demise to, or permit any other person to occupy the premises, or any part thereof, without the consent in writing of the lessor." The lessee underlet a portion for one year from the 31st of January 1873, the lessor knowing this distrained for rent due on the 4th of July, and again on the 29th of September. It was held that he had waived the breach of the covenant not to demise without consent, and that permitting the undertenant to remain in occupation was not a continuing breach of the covenant "not to permit any other person to occupy" (*z*). The receipt of rent by the lessor after a breach of covenant to insure only waives what has already happened, but as the breach is a continuing breach there is no further waiver (*a*). In order to render acceptance of rent, or any other act, a waiver of forfeiture, the lessor must have notice or knowledge of the forfeiture at the time of the acceptance of rent (*b*). It has been laid down that where the estate or lease is *ipso facto* void by the condition or limitation, no acceptance of the rent after can make it to have a continuance; it is otherwise of an estate or lease voidable by entry (*c*).

By the 23 & 24 Vict. c. 38, s. 6, "where any actua

(*v*) See *per* Parke, J., *Doe d. Griffith v. Pritchard*, 5 B. & Ad. 776; *Doe d. Cheney v. Batten*, Cowp. 243; 1 Smith's Leading Cases, Notes to Dumpsor's case, pp. 37, 38.

(*w*) *Jones v. Carter*, 15 M. & W. 718.

(*x*) *Grimwood v. Moss*, L. R. 7 C. P. 362; 41 L. J. C. P. 239.

(*y*) *Doe d. Baker v. Jones*, 5 Ex. 498.

(*z*) *Walrond v. Hawkins*, L. R. 10 C. P. 342; 44 L. J. C. P. 116.

(*a*) *Doe d. Muston v. Gladwin*, 6 Q. B. 953; but see this case commented on in *Walrond v. Hawkins*, *supra*.

(*b*) *Pennant's case*, 3 Co. R. 636; *Duppa v. Mayo*, 1 Wms. Saund. 288 a, b, note (16); *Goodright d. Walker v. Davids*, 2 Cowp. 803; *Roe d. Gregson v. Harrison*, 2 T. R. 425.

(*c*) 1 Co. Inst. 214 b; *Pennant's case*, *infra*; *Finch v. Throckmorton*, Cro. Eliz. 221. See Void and Voidable Leases, *ante*, p. 150.

waiver of the benefit of any covenant or condition in any lease on the part of any lessor, or his heirs, executors, administrators, or assigns, shall be proved to have taken place after the passing of this Act in any one particular instance, such actual waiver shall not be assumed or deemed to extend to any instance, or any breach of covenant or condition, other than that to which such waiver shall specially relate, nor to be a general waiver of the benefits of any such covenant or condition, unless an intention to that effect shall appear."

3. DISCLAIMER.

The tenant may commit a forfeiture by disclaiming or denying the landlord's title (either by setting up a title in some third person, or by claiming title in himself) (*d*). Except in cases of tenancies from year to year, or at will, a mere verbal disclaimer will not create a forfeiture (*e*), nor will payment of rent to a third person (*f*), but the disclaimer must be by matter of record. In one case, however, the term was held forfeited by a fraudulent giving up of possession to a third party (*g*). A disclaimer by tenant from year to year operates as a waiver of notice to quit, and, in effect, determines the tenancy at the election of the landlord (*h*). In order to constitute a disclaimer, the expressions used must amount to a denial of the existence of the relation of landlord and tenant (*i*). A tenant or assignee who brings ejectment against his landlord, and attempts to prove a freehold title, makes a disclaimer (*j*). Disclaimer.

A disclaimer may be waived by any act of the landlord acknowledging the party disclaiming as his tenant, as by discharging for subsequent rent in arrear (*k*).

(*d*) Bnc. Abr. Lenses, (T) 2; Doe Phillips v. Rollings, 4 C. B. 188; d. Williams v. Cooper, 1 M. & G. 139.

(*e*) Doe d. Graves v. Wells, 10 Ad. & E. 427.

(*f*) Doe d. Dillon v. Parker, Gow. 180; Doe d. Williams v. Pasquali, Peake, 196.

(*g*) Doe d. Ellenbrook v. Flynn, 1 C. M. & R. 137.

(*h*) Doe d. Bennett v. Long, 9 C. & P. 773; Doe d. Grubb v. Grubb, 10 B. & C. 816; Doe d. Phillips v. Rollings, 4 C. B. 188; Doe d. Davies v. Evans, 9 M. & W. 48; Doe d. Lansell v. Gower, 17 Q. B. 589; Doe d. Calvert v. Frowd, 4 Bing. 560.

(*i*) Doe d. Calvert v. Frowd, *supra*. And see the numerous cases in Woodfall's "Landlord and Tenant," pp. 326-328, 9th ed.

(*j*) Doe d. Jeffries v. Whittick, Gow. 195.

(*k*) Doe d. David v. Williams, 7 C. & P. 322.

CHAPTER IV.

NOTICE TO QUIT.

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I. FORM OF NOTICE.

Form of
notice.

IN the absence of any express stipulation, it is not necessary that the notice should be in writing (a).

A notice to quit will be taken to be a good notice if the tenant could not mistake its nature; but the Court will not construe a notice in a manner at variance with its express language, even if the effect of adhering to such language would be to make the notice bad. So notices dated in the wrong year (*b*), or misdescribing the premises (*c*), or their situation, have been held good (*d*). A notice was given in October 1833 to quit premises held under a yearly tenancy from February, "at the expiration of half a year from the delivery of this notice, or at such other time or times as your *present* year's holding of the premises shall expire after the expiration of half a year from the delivery of this notice." It was held that this would operate as a notice to quit in February 1835, although the notice was inaccurate, and that the word "*present*" might be rejected as surplusage (-). Upon the other hand, the Courts have declined to give a meaning contrary to the words used, in order to support a notice. Where the notice was given in October 1842, to quit in May next, "or upon such other day or time as the *current*

- (a) *Timmins v. Rowlinson*, 3 Burr. 1603; *Doe d. Lord Macartney v. Crick*, 5 Esp. 196. (d) *Doe d. Armstrong v. Wilkinson*, 12 A. & E. 743.
(b) *Doe d. Duke of Bedford v. Kightley*, 7 T. R. 63. In this case there was evidence of a parol notice. (e) *Doe d. Williams v. Smith*, 5 Ad. & L. 350. See *Doe d. Mayor of Richmond v. Morphet*, 7 Q. B. 577; *Doe d. Lord Huntingtower v. Culliford*, 4 D. & R. 248; *Ashtown v. Larke*, 6 Ir. R. C. L. 270.
(c) *Doe d. Cox v. —*, 4 Esp. 185.

year for which you now hold will expire," which would be in November 1842, it was held a bad notice, for it could not be intended to refer to November 1843. Pateson, J., said, "That if the notice were read as if the words were the 'current year next ending half a year after this notice,' it would be within the case of *Doe d. Williams v. Smith* (f), and the notice would be good" (g).

The notice must not be ambiguous or optional, as for instance, "I desire you to quit, or else that you agree to pay double rent" (h); but a notice to quit at the end of the current year, "on failure whereof I shall require you to pay me double former rent, or value for so long as you detain possession," was held good (i).

The time at which the notice requires the tenant to quit must be the expiration of the term of his tenancy (j).

The effect of a notice to quit on Michaelmas Day, &c., and the interpretation put upon such a notice with respect to new or old style depends upon whether the tenant is misled by the terms of the notice or not, and upon what the parties meant at the time of making the agreement (k). Where the agreement is by deed, new Michaelmas Day must be intended (l); but where the agreement is by parol, extrinsic evidence may be given of the intention of the parties (m).

The notice must extend to all the premises demised, and not merely to a part (n); but the Court will incline to construe a notice as a notice to quit the whole of the premises rather than hold it a bad notice (o). A joint-tenant, or

(f) Cited *supra*, note (e).

(g) *Doe d. Mayor of Richmond v. Morphett*, *supra*; *Mills v. Goff*, 14 M. & W. 72. See *Post*, 210, and forms in Appendix.

(h) *Doe d. Matthews v. Jackson*, 1 Doug. 175, per Lord Mansfield; *Ferguson v. Daly*, 8 Ir. R.C.L. 216.

(i) *Doe d. Lyster v. Goldwin*, 2 Q. B. 143; *Doe d. Matthews v. Jackson*, *supra*.

(j) *Roe d. Jordan v. Ward*, 1 H. Bl. 97; *Doe d. Rawlings v. Walker*, 7 T. R. 478; *Doe d. Pitcher v. Donovan*, 1 Taunt. 555; *Kemp v. Derrett*, 3 Camp. 510; *Doe d. Eyre v. Lambley*, 2 Esp. 635. And a notice to quit at twelve o'clock at noon on the proper day is bad; *Page v. More*, 15 Q. B. 684, and see *ante*, p. 124.

(k) *Furley d. Mayor of Canterbury v. Wood*, 1 Esp. 198; *Doe d. Hinde v. Vince*, 2 Camp. 256.

(l) *Doe d. Spier v. Lea*, 11 East. 312; *Smith v. Walton*, 8 Bing. 233.

(m) *Denn d. Peters v. Hopkinson*, 3 D. & R. 507; *Doe d. Hall v. Benson*, 4 B. & Ald. 588.

(n) *Right d. Fisher v. Cuthell*, 5 East. 498; *Doe d. Rold v. Archer*, 14 East. 245; *Prince v. Evans*, 29 L. T. N.S. 835. This does not apply to a notice to quit for purposes of improvement under the Agricultural Holdings Act. See *infra*, note (q).

(o) *Doe d. Rodd v. Archer*, *supra*; *Doe d. Morgan v. Church*, 3 Camp. 71.

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A notice to quit and give up possession was held not to be bad notwithstanding it did not state to whom the possession was to be given up (*r*).

The notice need not state the day upon which the tenant is to quit, but it is sufficient to give notice to quit "at the expiration of the current year" (*s*), even although upon the face of the notice it does not appear that it was given within the proper time (*t*). When the date of commencement of the tenancy is unknown, the notice should be to quit on a specified quarter-day, "or at the expiration of the current year of your tenancy which shall expire next after the end of one half year from the service of this notice" (*u*).

A notice by an agent is good, without stating the authority of the landlord, provided it is such a notice as the tenant may act upon with safety, and has reason to believe to be binding upon the landlord (*v*).

It is not necessary that the notice should be directed to the tenant, if it be delivered to him as tenant (*w*); and if it be directed to the tenant by a wrong Christian name, and he keeps it, he waives the objection, and will be bound by the notice (*x*). A bad notice passed on to an under-tenant may nevertheless be taken advantage of (*y*).

(*p*) *Doe d. Whayman v. Chaplin*, 3 Taunt. 120; *Cutting v. Derby*, 2 W. Bl. 1075; *Doe d. Robertson v. Gardner*, 12 C. B. 323.

(*q*) *Doe d. Davenport v. Rhodes*, 11 M. & W. 662, 606, and the cases there cited. Where notice to quit is given under s. 52 of the Agri. Hold. Act with a view to resumption for improvements, it is no objection that it relates to part only of the holding, but the tenant may within twenty-eight days accept it as a notice to quit the entire holding.

(*r*) *Doe d. Bailey v. Foster*, 3 C. B. 215.

(*s*) *Doe d. Lord Huntingtower v.*

Culliford, 4 D. & R. 248; *Doe d. Williams v. Smith*, 5 A. & E. 350; *Doe d. Mayor of Richmond v. Morphet*, 7 Q. B. 577.

(*t*) *Doe d. Gorst v. Timothy*, 2 C. & K. 351.

(*u*) *Doe d. Digby v. Steel*, 3 Camp. 117; *Hirst v. Horn*, 6 M. & W. 393.

(*v*) *Jones v. Phipps*, 37 L. J. Q. B. 198; L. R. 3 Q. B. 567. See also *Doe d. Lyster v. Godwin*, 2 Q. B. 143.

(*w*) *Doe d. Matthewson v. Wrightman*, 4 Esp. 5.

(*x*) *Doe v. Spiller*, 6 Esp. 70.

(*y*) *Prince v. Evans*, 29 L. T. N.S. 834.

A notice to quit need not be attested, and it may be proved by an examined copy or duplicate without notice to produce the original (z).

2. WHEN TO BE GIVEN.

In general, a tenancy may be determined by half a year's notice expiring at the end of the first or any subsequent year (a), and in the case of a yearly tenancy uncontrolled by custom or special stipulation, such a notice is necessary (b). By the Agricultural Holdings Act, 1875 (c) in tenancies from year to year where a half year's notice expiring with a year of tenancy is, by law, necessary and sufficient, a year's notice must be given, except in cases of bankruptcy (d). This must be taken, however, subject to the general provisions of the Act (e). The parties may, however, stipulate for a longer or shorter notice, and in that case the notice stipulated for must be given (f), or, under certain circumstances, they may agree that the tenant may quit without giving notice (g). But a stipulation depriving either party of the right of giving notice is bad (h). Where a "six months" notice is to be given, it was held by Wood, V.C., that a six lunar months' notice was sufficient (i). Where the tenancy created is for two or three years at least it cannot be determined by notice to quit before the expiration of that term (j).

When a lease is determinable upon a certain event, or at a particular period, no notice to quit is necessary, because both parties are equally apprised of the determination of the term (k). So where a demise is for one year (l), for a number of years (m), till a particular day (n), during joint

(z) *Doe d. Fleming v. Somerton*, 7 Q. B. 58.

(a) *Doe d. Clarke v. Smaridge*, 7 Q. B. 957; *Doe d. Plumer v. Mainby*, 10 Q. B. 473.

(b) *Parker d. Walker v. Constable*, 3 Wils. 58; *Right d. Flower v. Darby*, 1 T. R. 159.

(c) 38 & 39 Vict. c. 92, s. 51.

(d) Which will follow the old law; see *ex parte Llynvi Coal Co.* L. R. 7 Ch. 28; see *post*, Part iv. ch. 2, Bankruptcy.

(e) *Seesects.* 54-57, *post*, Fixtures.

(f) *Doe d. Green v. Baker*, 8 Taunt. 241; *Doe d. Robinson v. Dobell*, 1 Q. B. 806.

(g) *Bethel v. Blencowe*, 3 M. & G. 119; *Shirley v. Newman*, 1 Esp. 266; *Sparrow v. Hawkes*, 2 Esp. 595.

(h) *Doe d. Warner v. Browne*, 8 East. 165.

(i) *Rodgers v. Dock Company at Kingston-upon-Hull*, 34 L. J. Ch. 165.

(j) *Doe d. Chadborn v. Green*, 9 A. & E. 658; *Jones v. Nixon*, 1 H. & C. 48, 31 L. J. Ex. Ch. 505.

(k) *Per Lord Mansfield, C.J.*, in *Right v. Darby*, 1 T. R. 162.

(l) *Cobb v. Stokes*, 8 East. 358, 361; *Johnston v. Huddleston*, 4 B. & C. 937; *Strickand v. Maxwell*, 2 Cr. & M. 539.

(m) *Messenger v. Armstrong*, 1 T. R. 54; *Doe d. Godsell v. Inglis*, 3 Taunt. 54.

(n) *Doe d. Leeson v. Sayer*, 3 Camp. 8.

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lives (o), during the continuance of a partnership (p), or during service (q), no notice is necessary. So where a tenant holds under a mere agreement for a lease for a term, no notice to quit is necessary at the end of the term (r). With respect to lodgings, &c., if the tenancy be for a quarter, month, or week, no notice to quit is necessary; but if from quarter to quarter, month to month, week to week, then the corresponding notice must be given. If there is no custom or stipulation as to the notice, some reasonable notice must be given, even in the case of a weekly tenancy (s). No notice is necessary in the case of a mere tenancy at will (t), but some demand of possession or entry must be made on or before ejectment brought (u). A tenant on sufferance, or an intruder, is not even entitled to a demand of possession (v). And so also in the case of a mortgagor who has been allowed to remain in possession (w). Yearly tenants of a mortgagor, who were tenants before the mortgage, are entitled to notice; but those who became tenants after the mortgage are not even entitled to a demand of possession (x). Where the plaintiff claims the lands by a title paramount to the landlord of the defendant, no notice to the defendant is necessary (y).

A disclaimer operates as a waiver of notice (z).

3. BY WHOM AND TO WHOM GIVEN.

By whom and to whom given.

A notice to quit should be given by a landlord to his immediate tenant, and not to a mere under-tenant (a); and

(o) *Doe d. Bromfield v. Smith*, 6 East. 530.

(p) *Doe d. Waithman v. Miles*, 1 Stark. 181.

(q) *Doe d. Hughes v. Corbett*, 9 C. & P. 494.

(r) *Doe d. Tilt v. Stratton*, 4 Bing. 446; *Doe d. Davenish v. Moffatt*, 15 Q. B. 257; *Tress v. Savage*, 4 E. & B. 36. The case of *Chapman v. Towner*, 6 M. & W. 100, seems to be to the contrary. It is not referred to in the two cases last above cited, nor is the case of *Doe d. Tilt v. Stratton* referred to in *Chapman v. Towner*.

(s) *Huffel v. Armistead*, 7 C. & P. 56; *Jones v. Mills*, 10 C. B. N.S. 788, 31 L. J. C. P. 66. *Williams, J.*, thought a week's notice necessary; but the rest of the Court merely stated that there should be some reasonable notice. See also *ante*, pp. 210, 211.

(t) *Doe d. Tones v. Chamberlaine*, 5 M. & W. 14; *Doe d. Jones v. Jones*, 10 B. & C. 718.

(u) *Goodtitle d. Galloway v. Herbert*, 4 T. R. 680; *Denn d. Brune v. Rawlings*, 10 East. 261; *Doe d. Jacobs v. Phillips*, 10 Q. B. 130.

(v) *Doe d. Moore v. Lawder*, 1 Starkie, 308; *Doe d. Leeson v. Sayer*, 3 Camp. 8; *Doe d. Knight v. Quigley*, 2 Camp. 505.

(w) *Doe d. Roby v. Maisey*, 8 B. & C. 767; *Doe d. Fisher v. Giles*, 5 Bing. 421; *Doe d. Snell v. Tom*, 4 Q. B. 615.

(x) *Keech v. Hall*, 1 Doug. 21; 1 Smith, L. C. 505, 5th edit.

(y) *Doe d. Putland v. Hilder*, 2 B. & A. 782.

(z) *Per Best, C. J.*, in *Doe d. Calvert v. Frowd*, 4 Bing. 560.

(a) *Pleasant d. Hayton v. Benson*, 14 East. 234; *Burn v. Phelps*, 1 Stark. 94.

the tenant should give a similar notice to his under-tenants ; although, if they refuse to give up possession, the tenant will still be liable to ejectment (b). A notice to quit given by the tenant should be given to his immediate landlord ; and if he is dead, or has assigned, the notice should be given to the person legally entitled to the immediate reversion (c).

Notice given to or by an agent properly authorised at the time of giving the notice is sufficient (d). So a receiver duly appointed, and with a general authority to let lands from year to year, has implied authority to give notice to quit (e). But a mere receiver of rents has no such authority (f).

One of several executors or administrators may give notice on behalf of all (g).

Joint-tenants and tenants in common, upon giving notice, may severally recover their respective shares which they have jointly demised (h) ; and a notice to quit, signed by one on behalf of all, is sufficient to determine the tenancy as to all (i). A notice to quit, given by a tenant in common, may be to quit his undivided part or share (j). Valid notice to quit may be given by a mortgagor, having authority from the mortgagee, where the tenancy has been created before the mortgage, and where the tenant is aware of the giving of the authority (k).

4. HOW SERVED.

The notice must be served at the dwelling-house on the party himself, or delivered to his wife or servant (l).

The service is sufficient if it be made at the house of the

(b) *Roe v. Wiggs*, 2 B. & P. N. R. 330.

(c) *Cole Eject.* 46.

(d) *Doe d. Prior v. Ongley*, 10 C. B. 25 ; *Papillon v. Brunton*, 5 H. & N. 518, 29 L. J. Ex. 265 ; *Doe d. Mann v. Walters*, 10 B. & C. 626 ; *Doe d. Lyster v. Godwin*, 2 Q. B. 143 ; even when signed in his own name. *Erne v. Armstrong*, 6 Ir. R. C. L. 279.

(e) *Wilkinson v. Colley*, 5 Burr. 2696 ; *Doe d. Marsack v. Read*, 12 East 57 ; *Doe d. Earl Manvers v. Mizem*, 2 Moo. & R. 56.

(f) *Doe d. Mann v. Walters*, *supra*, per Parke, J.

(g) *Cole Eject.* 43.

(h) *Doe d. Whayman v. Chapman*, 3 Taunt. 120, *Cole Eject.* 44.

(i) *Doe d. Aslin v. Somersset*, 1 B. & Ad. 135 ; *Doe d. Kindersley v. Hughes*, 7 M. & W. 139.

(j) *Cutting v. Derby*, 2 Wm. Bl. 1075 ; *Doe d. Robertson v. Gardiner*, 12 C. B. 323.

(k) *Stackpoole v. Parkinson*, 8 Ir. R. C. L. 561.

(l) *Smith v. Clarke*, 9 Dowl. 202 ; *Jones d. Griffiths v. Marsh*, 4 T. R. 464 ; *Roe d. Blair v. Street*, 2 A. & E. 329 ; *Doe d. Neville v. Dunbar*, M. & M. 10. See s. 41 as to service under Ag. Hold. Act in Appendix.

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tenant upon a person whose duty it would be to deliver the notice to the tenant, for such person is the agent to receive the notice, and the presumption then arises that it did in fact reach the tenant (*m*). Notice to quit was given to the widow of a tenant, whose son subsequently took out letters of administration, and brought ejectment against a new tenant let in upon expiration of the notice, it was held that the service of the notice to quit upon the widow was sufficient, and therefore the son could not recover possession (*n*). It seems to have been doubted in one case whether service on the wife of the tenant, but not on the premises, was sufficient (*o*). Where a notice to quit was placed under the door of the tenant's house, and his wife proved that the notice was received by the tenant in due time, it was held a sufficient service (*p*). So a notice to quit may be sent by post; and where a notice to quit at Michaelmas was sent through the post by the tenant on the morning of the 25th of March, to the place of business of the landlord's agent, and the jury found that the letter was delivered that evening during the hours of business (*q*), although the agent did not find it till the following morning, it was held sufficient (*r*).

5. WAIVER OF NOTICE.

Waiver of Notice.

A notice to quit puts an end to the tenancy by the agreement of the parties, who can also agree to waive the notice, and so to create a new tenancy (*s*). Where the landlord has given notice, but the tenant holds over, the landlord cannot waive the notice, and distrain for rent subsequently accruing; for there is no "agreed rent" to distrain for until a new tenancy arises (*t*). A waiver of notice will be presumed from a receipt of rent as such, subsequently to the expiration of the notice (*u*); but a mere demand is a question of intention, which must be left to the jury (*v*). So a second notice

(*m*) *Tanham v. Nicholson*, L. R., 5 H. L. C. 561; and per Lord Westbury, it would seem it ought to be conclusive evidence, otherwise the landlord's right would be controlled by something to which he was an utter stranger. The above case was one of service upon a daughter who also acted as servant.

(*n*) *Sweeny v. Sweeny*, 10 Ir. R. C. L. 375. Exch.

(*o*) *Roe d. Blair v. Street*, 2 A. & E. 329.

(*p*) *Alford v. Vickory*, Car. & M. 280.

(*q*) *Per Bramwell, B.*

(*r*) *Papillon v. Brunton*, 5 H. & M. 518, 29 L. J. Ex. 265.

(*s*) *Blyth v. Dennet*, 13 C. B. 180; *Dendy v. Nichol*, 4 C. B. N.S. 381; *Tayleur v. Wildin*, 37 L. J. Ex. 173.

(*t*) *Jenner v. Clegg*, 1 Moo. & R. 213; *Alford v. Vickory*, 1 Car. & M. 280.

(*u*) *Goodright d. Charter v. Cordwent*, 6 T. R. 219; *Croft v. Lumley*, 5 E. & B. 648, 6 H. L. Cas. 672; *Blyth v. Dennet*, 13 C. B. 180.

(*v*) *Blyth v. Dennet*, *supra*.

will operate as a waiver of the first (*w*), unless it be clear that it is not intended to have that effect (*x*). A good parol notice, however, will not be waived by a subsequent insufficient notice in writing (*y*).

As is stated above, the parties may mutually agree to waive a notice to quit which has been given, but the tenant will not be allowed to take advantage of a mere indulgence on the part of a landlord, and treat it as a waiver (*z*).

A disclaimer operates as a waiver of notice (*a*).

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| <p>(<i>w</i>) <i>Doe d. Brierley v. Palmer</i>,
16 East. 53.</p> <p>(<i>x</i>) <i>Doe d. Williams v. Humphreys</i>, 2 East. 237; <i>Doe d. Godsell v. Inglis</i>, 3 Taunt. 54; <i>Messenger v. Armstrong</i>, 1 T. R. 53.</p> <p>(<i>y</i>) <i>Doe d. Lord Macartney v. Crick</i>, 5 Esp. 196.</p> | <p>(<i>z</i>) <i>Whiteacre d. Boulton v. Symonds</i>,
10 East. 13, 17; <i>Doe d. Lord Macartney v. Crick</i>, 5 Esp. 196; <i>Doe d. Marquis of Hertford v. Hunt</i>, 1 M. & W. 690.</p> <p>(<i>a</i>) See <i>ante</i>, 208.</p> |
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CHAPTER V.

HOLDING OVER.

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UPON the determination of the tenancy, the landlord is entitled to receive the full and complete possession from his tenant, who must therefore deliver up to his landlord the peaceable and quiet possession of the demised premises, together with all fixtures (*a*), except what he is entitled to remove; and also all growing crops, unless there be an agreement or custom (*b*) to the contrary (*c*), as well as encroachments which are presumed to be made for the benefit of the tenant during the term and of the landlord upon its determination (*d*). If the tenant holds over after the expiration of the notice to quit, whereby the landlord is prevented from delivering possession to a party to whom he had agreed to let the premises, the landlord can recover the reasonable damages and costs that he has sustained (*e*). Where it is impossible for the tenant to give up possession, by reason of the ill-will or obstinacy of his under-tenant, to whom he has let the whole or part of the premises, the original tenant will still be liable (*f*). The landlord, however, may discharge him by accepting the under-tenant as his tenant. Where the tenant holds over, the landlord may enter on the demised premises peaceably and without action, if he can succeed in doing

(*a*) See Fixtures, p. 238.

(*b*) See Emblements, p. 228.

(*c*) *Caldecott v. Smythies*, 7 C. & P. 808; *Henderson v. Squire*, L. R. 4 Q. B. 170.

(*d*) *Doe d. Lloyd v. Jones*, 15 M. & W. 580; *Doe d. Croft v. Tilbury*; 14 C. B. 304; *Earl of Lisbourne v. Davis*, L. R. 1 C. P. 193; *Whitmore v. Humphries*, L. R. 7 C. P. 1; 41 L. J. C. P. 43; *Drummond v. Sant*, 41 L. J. Q. B. 21.

(*e*) *Bramley v. Chesterton*, 2 C. B. N.S. 592, 27 L. J. C. P. 23; *Henderson v. Squire*, *supra*.

(*f*) *Harding v. Crethorn*, 1 Esp. 57; *Ibbs v. Richardson*, 9 A. & E. 849; *Waring v. King*, 8 M. & W. 571; *Henderson v. Squire*, *supra*. See also *Christy v. Tancred*, 7 M. & W. 127, 9 M. & W. 438; *Tancred v. Christy*, 12 M. & W. 316; *Draper v. Crofts*, 15 M. & W. 166.

so (g); but if he break in forcibly, so as to endanger a breach of the peace, he may be liable to the risk of an indictment (h). It is safer, therefore, to proceed by action for the recovery of the premises.

Claims for mesne profits, rent and damages, may all be joined now in an action for recovery of land, and by leave of the court or judge any other claims may be joined (i).

If the tenant holds over after notice to quit, and is permitted to remain in possession, it is a question for the jury whether a new tenancy from year to year exists (j).

Formerly an action of ejectment was commenced by a special form of writ of ejectment under the 169th sect. of the C. L. P. Act, 1852, but now (k) the writ will be in the usual form, the indorsement only showing the nature of the claim. Under the former procedure the defendant had sixteen days for appearance; but now as in other actions he has only eight days. The right of a landlord to appear and defend is preserved (l), and he may limit his defence to part of the property claimed (m). A defendant in possession need not now (n) in general plead his title unless his defence depends upon equitable grounds.

In case no appearance is entered, or is only entered as to part, the plaintiff may sign judgment accordingly (o), and where he joins a claim for mesne profits, arrears of rent, or damages, he may enter judgment for the land and proceed in the usual manner as to the rest of his claim (p). He may also enter judgment for want of a plea, &c. (q), and if he has joined other claims he may, if the defendant, or one of the defendants,

(g) *Taylor v. Cole*, 1 Smith's L. C. 5th edit., 111.

(h) *R. v. Smyth*, 1 M. & R. 155, judgment of Lord Tenterden. See *Newton v. Harland*, 1 M. & Gr. 664, where it was held that the landlord may be liable to an action at the suit of the tenant, but that point is not decided; *Harvey v. Bridges*, 14 M. & W. 437; *Wright v. Burroughes*, 3 C. B. 699; *Davison v. Wilson*, 11 Q. B. 890; *Davis v. Burrell*, 10 C. B. 825.

(i) Jud. Act, 1875, Order xvii., Rule 2, and see Forms in Appendix. As to judgment, see *Wilson's Jud. Acts*, 188, 229, 201.

(j) *Vance v. Vance*, 5 Ir. R. C.

L. 363; *Caulfield v. Farr*, 7 Ir. R. C. L. 469; and see the cases *ante*, p. 194, note (a).

(k) Jud. Act, 1875, Order ii. R. 3. In case of vacant possession service of the writ may be made by posting a copy on some conspicuous part of the property, Order ix. R. 8. As to service out of the jurisdiction, see Order xi. R. 1, and see Rules June 1876.

(l) Order xii. Rules 18-22.

(m) Rule 21.

(n) Order xix. Rule 15.

(o) Order xiii. Rule 7.

(p) Order xiii. Rule 8.

(q) Order xxix. Rule 7.

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Judgment may be enforced by a writ of possession (s), which can be sued on upon filing an affidavit showing due service of the judgment and that the same has not been obeyed (t).

I. SMALL TENEMENTS ACT.

In order to save the landlords of small tenements the expense and delay of a proceeding by ejectment to recover possession, where a tenant refused to quit on the determination of his interest in the premises, the statute 1 & 2 Vict. c. 74, s. 1, enacted, that "When and so soon as the term or interest of the tenant of any house, land, or other corporeal hereditaments held by him at will, or for any term not exceeding seven years, either without being liable to the payment of any rent, or at a rent not exceeding the rate of £20 a year, and upon which no fine shall have been reserved or made payable, shall have ended, or shall have been duly determined by a legal notice to quit or otherwise, and such tenant or (if such tenant do not actually occupy the premises, or only occupy a part thereof) any person by whom the same, or any part thereof, shall be then actually occupied, shall neglect or refuse to quit and deliver up possession of the premises, or of such part thereof respectively, it shall be lawful for the landlord of the said premises, or his agent, to cause the person so neglecting or refusing to quit and deliver up possession to be served (in the manner hereinafter mentioned) with a written notice in the form set forth in the schedule in this Act, signed by the said landlord or his agent, of his intention to proceed to recover possession under the authority and according to the mode prescribed in this Act; and if the tenant or occupier shall not thereupon appear at the time and place appointed, and show to the satisfaction of the justices hereinafter mentioned reasonable cause why possession should not be given under the provisions of this Act, and shall still neglect or refuse to deliver up possession of the premises, or of such part thereof of which he is then in possession, to the said landlord or his agent, it shall be lawful for such landlord or agent to give to such justices proof of the holding, and of the end or other determination of the

(r) Order xxix. Rule 8.

(s) Order xlii. Rule 3; and Or-

der xlviii. Rule 1, for form of writ see Appendix.

(t) Order xlviii. Rule 2.

tenancy, with the time and manner thereof; and where the title of the landlord has accrued since the letting of the premises, the right by which he claims the possession; and upon proof of service of the notice and of the neglect or refusal of the tenant or occupier, as the case may be, it shall be lawful for the justices acting for the district, division, or place within which the said premises, or any part thereof, shall be situate, in petty sessions assembled, or any two of them, to issue a warrant under their hands and seals to the constables and peace-officers of the district (u), division, or place within which the said premises, or any part thereof, shall be situate, commanding them within a period to be therein named, not less than twenty-one nor more than thirty clear days from the date of such warrant, to enter (by force if needful) into the premises, and give possession of the same to such landlord or agent: provided always that entry upon any such warrant shall not be made on a Sunday, Good Friday, or Christmas Day, or at any time except between the hours of nine in the morning and four in the afternoon: provided also, that nothing herein contained shall be deemed to protect any person on whose application and to whom any such warrant shall be granted, from any action which may be brought against him by any such tenant or occupier, for or in respect of such entry and taking possession, where such person had not, at the time of granting the same, lawful right to the possession of the same premises: provided also, that nothing herein contained shall affect any rights to which any person may be entitled as outgoing tenant by the custom of the country or otherwise."

A like remedy is given to the valuer under the Inclosure Acts in respect of encroachments, and recent inclosures of land subject to the provisions of those Acts (v). By "The Charitable Trusts Act, 1860" (w), a like remedy is given to the trustees against a schoolmaster wrongfully holding over.

By the 59 Geo. III. c. 12, ss. 24, 25, churchwardens and overseers of hereditaments belonging to the parish (x) can, in the mode therein provided, obtain a warrant from the justices for the possession of hereditaments belonging to the parish

(u) *Jones v. Chapman*, 14 M. & W. 124. (w) 23 & 24 Vict. c. 136, s. 13. As to land vested in the Secretary of State for War, see 22 Vict. c. 12, s. 5.
(v) 15 & 16 Vict. c. 79, s. 13; *Chilcote v. Youlden*, 29 L. J. M. C. 197. (x) See *ante*, Part I, c. 1, p. 15.

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which are wrongfully held over (y), and the justices may inquire into the matter although a claim of title arises (z).

By 19 & 20 Vict. c. 108, s. 50 (a), "When the term and interest of the tenant of any corporeal hereditament, where neither the value of the premises nor (b) the rent payable in respect thereof shall have exceeded £50 by the year, and upon which no fine or premium shall have been paid, shall have expired or shall have been determined, either by the landlord or the tenant by a legal notice to quit, and such tenant, or any person holding or claiming by, through, or under him, shall neglect or refuse to deliver up possession accordingly, the landlord may enter a plaint, at his option, either against such tenant or against such person so neglecting or refusing, in the County Court of the district in which the premises lie, for the recovery of the same, and thereupon a summons shall issue to such tenant or such person neglecting or refusing; and if the defendant shall not, at the time named in the summons, show good cause to the contrary, then, on the proof of his still neglecting or refusing to deliver up the possession of the premises, and of the yearly value and rent of the premises, and of the holding, and of the expiration or other determination of the tenancy, with the time and manner thereof, and of the title of the plaintiff, if such title has accrued since the letting of the premises, and of the service of the summons on the defendant thereto, the judge may order that possession of the premises mentioned in the plaint be given by the defendant (c) to the plaintiff, either forthwith or on or before such day as the judge shall think fit to name; and if such order be not obeyed, the registrar, whether such order can be proved to have been served or not, shall, at the instance of the plaintiff, issue a warrant authorising and requiring the high bailiff of the Court to give possession of such premises to the plaintiff."

The relation of landlord and tenant must exist to enable

(y) As to cottage allotments, see 2 & 3 Will. IV. c. 42, ss. 5, 11.

(z) *Ex parte Vaughan*, 7 B. & S. 902, L. R. 2 Q. B. 114, 36 L. J. M. C. 17.

(a) This section is an amendment of 9 & 10 Vict. c. 95, s. 122. The cases on the latter section are *In re Earl of Harrington v. Ramsay*, 8 Ex. 879; *Fearon v. Norvall*, 5 D. & L. 445; *Crowley v. Vitty*, 7 Ex. 319.

(b) The word "or" was used in sect. 122 of 9 & 10 Vict. c. 95. See *supra*, note (a).

(c) An order of possession against a tenant is not conclusive against another person holding through him and in possession, who may bring trespass if the landlord had not in fact the right to possession. *Hudson v. Walker*, 41 L. J. Ex. 51; *Per Channell & Pigot*, B. B. Martin B. diss.

the Court to have jurisdiction. Where plaintiff claimed as a mortgagee, and the defendant, who held under a demise from the mortgagor subsequent to the mortgage, had never attorned to the plaintiff, it was held that the statute did not apply (*d*). Where defendant was let into possession of premises under an agreement to purchase, and he agreed to pay 8s. a week rent, to be afterwards deducted from the purchase-money, and he had paid, under this agreement, sums of money which, with a set-off, equalled the amount of the purchase money, it was held that the relation of landlord and tenant did not exist (*e*).

If a *bona fide* claim of title is set up and proved to exist, the County Court judge has no jurisdiction to decide the case (*f*) except by the written consent of the parties or their attorneys (*g*). But the tenant is estopped from denying his landlord's title (*h*). Under sect. 51, plaintiff may add a claim for rent or mesne profits as against his tenant down to the day of leaving, so that his claim does not exceed £50 (*i*).

By 19 & 20 Vict. c. 108, s. 52, "When the rent of any corporeal hereditament, where neither the value of the premises nor the rent payable in respect thereof exceeds £50 by the year, shall for one half year be in arrear, and the landlord shall have right by law to re-enter for the non-payment thereof, he may, without any formal demand or re-entry, enter a plaint in the County Court of the district in which the premises lie for the recovery of the premises; and thereupon a summons shall issue to the tenant, the service whereof shall stand in lieu of a demand or re-entry; and if the tenant shall, five clear days before the return-day of such summons, pay into Court all the rent in arrear, and costs, the said action shall cease; but if he shall not make such payment, and shall not at the time named in the summons show good cause why the premises should not be recovered, then, on proof of the yearly value and rent of the premises, and of the fact that one half-year's rent was in arrear before the

(*d*) Jones v. Owen, 5 D. & L. 669.

(*e*) Banks v. Rebbeck, 2 L. M. & P. 452.

(*f*) Lilley v. Harvey, 5 D. & L. 648; Fearon v. Norvall, Id. 439; Marwood v. Waters, 13 C. B. 820; Latham v. Spedding, 17 Q. B. 440; Lloyd v. Jones, 6 C. B. 81, 5 D. & L. 784; Pearson v. Glazebrook, 37 L. J. Ex. 15, L. R. 3 Ex. 27.

(*g*) 19 & 20 Vict. c. 108, s. 25.

(*h*) See Leases by Estoppel, *ante*, p. 111. *In re Emery v. Barnett*, 27 L. J. C. P. 216, 4 C. B. N.S. 423; Lloyd v. Jones, 6 C. B. 81.

(*i*) See Campbell v. Loader, 8 H. & C. 520. Claims for rent and mesne profits may now be joined also in the superior courts under the Jud. Act, 1875, Order xvii. Rule 2.

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plaint was entered, and that no sufficient distress was then to be found on the premises to countervail such arrear, and of the landlord's power to re-enter, and of the rent being still in arrear, and of the title of the plaintiff, if such title has accrued since the letting of the premises, and of the service of the summons, if the defendant shall not appear thereto, the judge may order that possession of the premises mentioned in the plaint be given by the defendant to the plaintiff on or before such day, not being less than four weeks from the day of hearing, as the judge shall think fit to name, unless within that period all the rent in arrear and costs be paid into Court, and if such order be not obeyed, and such rent and costs be not so paid, the registrar shall, whether such order can be proved to have been served or not, at the instance of the plaintiff, issue a warrant authorising and requiring the high bailiff of the court to give possession of such premises to the plaintiff, and the plaintiff shall, from the time of the execution of such warrant, hold the premises discharged of the tenancy, and the defendant, and all persons claiming by, through, or under him, shall, so long as the order of the Court remains unreversed, be barred from all relief in equity or otherwise."

2. DESERTION BY TENANT.

By 11 Geo. II. c. 19, s. 16, "If any tenant holding any lands, tenements, or hereditaments, at a rack-rent, or where the rent reserved shall be full three-fourths of the yearly value of the demised premises, who shall be in arrear for one year's rent (extended by 57 Geo. III. c. 52, to one half year's rent), shall desert the demised premises, and leave the same uncultivated or unoccupied, so as no sufficient distress can be had to countervail the arrears of rent, it shall and may be lawful to and for two or more justices of the peace of the county, riding, division, or place (having no interest in the demised premises), at the request of the lessor or landlord, lessors or landlords, or his, her, or their bailiff or receiver, to go upon and view (*j*) the same, and to affix or cause to be affixed on the most notorious part of the premises, notice in writing, what day (at the distance of fourteen days at least) (*k*) they will return to take a second view thereof; and if,

(*j*) Where the premises are within the Metropolitan Police District the police magistrate need not view the premises, but can, upon proof given to his satisfaction of the arrear of rent and desertion of the premises

by the tenant, issue his warrant, requiring a constable to view the premises; 3 & 4 Vict. c. 84, s. 13.

(*k*) i.e., fourteen clear days; *Creak v. the Justices of Brighton*, 1 F. & F. 110.

upon such second view, the tenant or some person on his or her behalf shall not appear and pay the rent in arrear, or there shall not be sufficient distress upon the premises, then the said justices may put the landlord or landlords, lessor or lessors, into the possession of the said demised premises; and the lease thereof to such tenants, as to any demise therein contained only, shall from thenceforward become void."

By sect. 17, such proceeding of the justices are examinable in a summary way by the judge going the circuit in his individual capacity, and not as a justice of assize (*l*). He may order restitution to be made to the tenant, together with the expenses and costs. If the judge affirms the act of the justice, he can award costs not exceeding five pounds.

The 57 George III. c. 52, extended the powers of the 11 Geo. II. c. 19, s. 16 (*m*), to the case of tenants "who shall hold such lands and tenements or hereditaments under any demise or agreement, either written or verbal, and although no right or power of re-entry be reserved or given to the landlord in case of non-payment of rent."

The above statutes apply to all demises, whether written or oral, however long may be the term and however large may be the amount of rent reserved (*n*). It matters not that the lease or agreement contains no condition or proviso for re-entry for non-payment of rent (*o*); and, therefore, this mode of proceeding may sometimes be adopted where no action of ejectment could be supported, nor any remedy obtained in the County Court. But the following circumstances must concur, viz. :—1. The rent reserved must be rack-rent, or full three-fourths of the yearly value of the demised premises. 2. One half year's rent at the least must be in arrear. 3. The premises must have been deserted and left uncultivated or unoccupied, so as no sufficient distress may be had to countervail the arrear of rent. No information or complaint on oath need be made before the justices; a mere request is sufficient (*p*). But upon an application to a metropolitan police magistrate, proof must be made to his satisfaction of the rent in arrear and desertion of the premises by the tenant (*q*). The justices are upon their own view to deter-

(*l*) Reg. v. Sewell, 8 Q. B. 161.

(*m*) Where by the terms of the lease the landlord had not a right of re-entry, it was held that this statute did not apply; *Ex parte Pilton* 1 B. & A. 369 a.

(*n*) *Ex parte Pilton*, see *supra*.

(*o*) *Edward v. Hodges*, 15 C. B. 477.

(*p*) *Basten v. Carew*, 3 B. & C. 649, *Re Perham*, 5 H. & N. 30.

(*q*) See *supra*, note (*j*), 3 & 4 Vict. c. 84, s. 13.

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mine whether the premises are deserted or not (*r*). Also whether they have been left uncultivated or unoccupied, so as no sufficient distress can be had to countervail the arrears of rent; also whether the rent reserved is a rack-rent, or full three-fourths of the yearly value of the demised premises. It has been decided, where a tenant ceased to reside on the premises for several months, and left them without any furniture or sufficient other property to answer the year's rent, that the landlord might properly proceed under the statute to recover the possession, although he knew where the tenant then was, and although the justices found a servant of the tenant on the premises when they first went to view the same (*s*). On the other hand, in a case where the wife and children of the tenant remained on the premises, but there was no furniture in the house except three or four chairs, which were stated by the wife to belong to a neighbour: it was held, on appeal (reversing the decision of the justices), that the premises had not been deserted within the meaning of the Act (*t*). Where magistrates had given possession of a dwelling-house as deserted and unoccupied, and the judges of assize on appeal made an order for restitution with costs, and the tenant brought an action of trespass for the eviction against the magistrates, the constable and the landlord, it was held that the record of the proceedings before the magistrates was an answer to the action on behalf of all the defendants (*u*).

3. DOUBLE VALUE.

Double value.

By 4 Geo. II. c. 28, s. 1 (*v*), "In case any tenant, or tenants for life, lives, or years, or other person or persons who are or shall come into possession of any lands, tenements, or hereditaments, by, from, or under, or by collusion with, such tenant or tenants, shall wilfully hold over any lands, tenements, or hereditaments after (*w*) the determination of such term or terms, and after demand made, and notice in writing given, for delivering the possession thereof by his or their landlords or lessors, or the person or persons to whom the remainder or reversion of such lands, &c., shall belong, his or

(*r*) *Basten v. Carew*, 3 B. & C. 649.

(*s*) *Ex parte Pilton*, *supra*. See *Taylorson v. Peters*, 7 A. & E. 110.

(*t*) *Ashcroft v. Bourne*, 3 B. & Ad. 684.

(*u*) *Ashcroft v. Bourne*, *supra*; *Basten v. Carew*, *supra*.

(*v*) As to the construction of this statute, which is a remedial law, see *Wilkinson v. Colley*, 5 Burr. 2694.

(*w*) *Page v. More*, 15 Q. B. 684.

their agent (*x*), or agents thereunto lawfully authorised, then and in such case such person or persons so holding over, shall for and during the time he, she, or they, shall so hold over, or keep the person or persons entitled out of possession of the said lands, tenements, or hereditaments as aforesaid, pay to the person or persons so kept out of possession, their executors, administrators, or assigns, at the rate of double the yearly value of the lands, tenements, and hereditaments (*y*) so detained, for so long as the same are detained, to be recovered in any of His Majesty's courts of record by action of debt (*z*), whereunto the defendant or defendants shall be obliged to give special bail (*a*), against the recovering of which said penalty there shall be no relief in equity."

The Act does not apply unless the holding over is wilful and contumacious. If the tenant, therefore, retains the possession under a fair claim of right (*b*), or there is a real dispute as to the landlord's title (*c*), or the premises are held over by a sub-tenant without the assent of the tenant (*d*), the tenant is not liable to pay double value. Where there had been a treaty for a further term between the landlord and tenant, but which afterwards went off, the tenant held over during the treaty; an action having been brought for double value under the statute, it was held by Lord Mansfield that the action was not maintainable (*e*). The remedy under the Act, that is, an action of debt, is given only to the landlord, or person entitled to the reversion. A new lessee, therefore, whose term is to begin on the ending of the first lease, having only an *interesse termini*, cannot sue for double value (*f*). This action will lie even after recovery of the premises by ejectment, where there was no real *bona fide* defence to the ejectment (*g*).

(*x*) A receiver appointed by the Court of Chancery in a suit depending, is a sufficient agent to give notice; *Wilkinson v. Colley*, 5 Burr. 2594. See *Goodtitle ex dem Read v. Badtittle*, 1 B. & P. 385; *Poole v. Warren*, 8 A. & E. 582.

(*y*) Where the owner of a woollen mill and steam-engine let a room with a supply of power from the engine, by means of a revolving shaft in the room, it was held, in estimating the double value of the premises, the value of the power supplied could not be included. *Robinson v. Learoyd*, 7 M. & W. 48.

(*z*) But not by distress; *Timmins v. Rawlinson*, 3 Burr. 1605. A demand for double value under this

statute is a plea of personal action, and may be sued for in the County Court; *Wickham v. Lee*, 12 Q. B. 521, 18 L. J. Q. B. 521.

(*a*) See *Wheeler v. Copeland*, 5 T. R. 364.

(*b*) *Wright v. Smith*, 5 Esp. 203; *Per Lord Ellenborough in Soulsby v. Neving*, 9 East. 313.

(*c*) *Swinfen v. Bacon*, 5 H. & C. 184, 846, 30 L. J. Ex. 33.

(*d*) *Rands v. Clark*, 19 W. R. 48.

(*e*) *Doe d. Cheney v. Batten*, Cowp. 243 M. S. 9 East. 315.

(*f*) *Blatchford v. Cole*, 5 C. P. N.S. 514, 20 L. J. C. P. 140.

(*g*) *Soulsby v. Neving*, 9 East. 310; *Wright v. Smith*, 5 Esp. 203.

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This statute requires that there should be a "demand made, and notice in writing given for delivering the possession" of the premises. A notice to quit (*h*), when regular, will operate also as a demand of the possession under the Act, without any more specific demand; and notices to deliver up the possession under the statute are not construed strictly (*i*). But where a notice required the tenant to give up the possession at twelve at noon on the day on which the tenancy was determinable, at which time the landlord would attend to receive the keys and the rent, and the notice stated that in the event of his not so surrendering, the landlord would demand a certain daily rent mentioned in the notice, which exceeded, in fact, double the amount of the original rent, it was held that this notice was insufficient, the tenant being required to give up the possession before the expiration of the tenancy (*j*).

A weekly tenant is not within the Act (*k*), neither is a tenant from quarter to quarter (*l*).

4. DOUBLE RENT.

By 11 Geo. II. c. 19, s. 18, "In case any tenant or tenants shall give notice of his, her, or their intention to quit the premises by him, her, or them, holden at a time mentioned in such notice, and shall not accordingly deliver up the possession thereof at the time in such notice contained, then the said tenant or tenants, his, her, or their executors or administrators, shall from henceforward pay to the landlord or landlords, lessor or lessors, double the rent or sum which he, she, or they should otherwise have paid, to be levied, sued for, and recovered at the same time and in the same manner as the single rent or sum before the giving such notice could be levied, sued for, or recovered, and such double rent or sum shall continue to be paid during all the time such tenant or tenants shall continue in possession as aforesaid." The landlord, therefore, may either distrain for the double rent, or

(*h*) See c. 4, Notice to Quit, *ante*.

(*i*) *Doe d. Matthew v. Jackson*, 1 Dougl. 175; *Poole v. Warren*, 8 A. & E. 582; *Doe d. Lister v. Goldwin*, 2 Q. B. 143; *Page v. Moore*, 15 Q. B. 684; *Messenger v. Armstrong*, 1 T. R. 53; *Hirat v. Horn*, 6 M. & W. 393. If a sufficient notice is given to a female tenant, who afterwards marries, the action

for not delivering up possession may be maintained against her husband without any new demand; *Lake v. Smith*, 1 B. & P. N. R. 174.

(*j*) *Page v. Moore*, 15 Q. B. 684.

(*k*) *Lloyd v. Rosbee*, 2 Camp. 453; but see *Co. Litt.* 54 b.

(*l*) *Sullivan v. Bishop*, 2 C. & P. 359; *Wilkinson v. Hall*, 3 Bing. N. C. 508.

bring an action for it upon the statute (*m*). The statute applies only to cases where the tenant has the power of determining the tenancy by a notice, and has given a valid notice to that effect (*n*). It is immaterial whether the tenancy is in writing or by parol, and the notice to quit need not be in writing (*o*). The statute does not extend to weekly tenants (*p*). A tenant who has given notice, and paid double rent, may quit at any time, without giving a fresh notice (*q*); and the landlord may waive his claim to double rent by accepting single rent (*r*).

(*m*) *Johnstone v. Huddlestons*, 4 B. & C. 922. (p) *Sullivan v. Bishop*, 2 C. & P. 359.

(*n*) *Ibid.* See *Farrance v. Elkington*, 2 Camp. 591. (q) *Booth v. Macfarlane*, 1 B. & Ad. 904.

(*o*) *Timmins v. Rawlinson*, 3 Burr. 1603. (r) *Doe d. Cheney v. Batten* Cowp. 243.

CHAPTER VI.

EMBLEMENTS.

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THE whole law relating to the rights of the tenant upon the determination of his tenancy has been considerably altered by the Agricultural Holdings Act (a), which came into operation upon the 14th of February 1876. This Act, however, does not apply (amongst other matters) to tenancies commencing before that date (b), nor does it apply where the contract of tenancy expressly excludes it or any part of it, nor where the holding is less than two acres, nor where the land is not used for agriculture or pasture. Moreover, the Act is in addition to, and not in substitution of, any existing contract, and the rights of landlord or tenant under any contract or custom are unaffected by the Act unless expressly overruled by it (c). The law upon the subject of emblements and improvements will therefore be considered in the following order :—(1) where there is no contract, but the tenancy is not within the scope of the Agricultural Holdings Act; (2) where there is a contract, but the tenancy is either not within the scope of the Agricultural Holdings Act, or is expressly exempted from its operation by the contract; and (3) where the Agricultural Holdings Act applies.

I. WHERE THERE IS NO CONTRACT.

The right to emblements is a right to the corn growing upon

Where they
may be
claimed.

- (a) 38 & 39 Vict. c. 92.
 (b) Except tenancies-at-will, where no notice is given that the Act is not to apply.
 (c) Ss. 54-60. By sect. 14 the tenant may claim either under the Act or the custom, and by sect. 59 he cannot recover under both in respect of the same matter. See the Act in Appendix.

the land on the determination of an uncertain estate by no act of the tenant. Emblements are allowed in order to encourage agriculture, for it would be obviously unjust to deprive the tenant of the benefit of the crop which he sowed at a time when he might reasonably expect to reap it (*d*). Thus where the tenant for life dies before harvest, his executors will be entitled to the crop, for that is the act of God (*e*). So the personal representatives of the incumbent of a benefice were held to be entitled to emblements of the glebe lands (*f*). Where the tenancy is at will, or from year to year (*g*), or for an uncertain term of years, as a term for so many years if the tenant should so long live (*h*), the executor is entitled to the emblements (*i*). So also tenants by statute-merchant and recognizance under extent or elegit, are entitled to emblements where, by some sudden and casual profit arising between seed-time and harvest-time, the tenancy is determined by the judgment being satisfied (*j*). So upon the death of a tenant by the courtesy, the executors are entitled to emblements (*k*). So also a tenant in dower, and a woman who has lands for her jointure, are entitled to emblements; but the latter is not entitled to the crop which was sown at the time of her husband's death (*l*). If a lease be made to husband and wife during the coverture, and afterwards they are divorced *causâ præcontractus*, the husband shall have the emblements, for the sentence which dissolves the marriage is the judgment of the law (*m*).

Where the uncertain event upon which the determination of the estate depends is the death or cessor of estate of the landlord, the common-law right has been qualified by the 14 & 15 Vict. c. 25, s. 1, which enables the tenant, in lieu of emblements, to hold over till the end of the current year. The section is as follows:—"Where the lease or tenancy of any farm or lands held by a tenant at a rack-rent shall determine by the death or cessor of the estate of any landlord entitled for his life, or for any other uncertain interest, in-

(*d*) Co. Litt. 55 b.; 2 Bl. Com. 146. *v. Collins*, 4 Bing. 207; *Barden's* case, 2 Leon. 54.

(*e*) Co. Litt. 55 b.

(*f*) *Williams on Exors.* 603, 4th edit. See 28 Hen. VIII. c. 11.

(*g*) *Kingsbury v. Collins*, 4 Bing. 207; *Haines v. Welch*, L. R. 4 C. P. 91, 38 L. J. C. P. 118.

(*h*) 1 Roll Abr. 727, pl. 12.

(*i*) 1 Inst. 55 b.; Co. Litt. 56 a.; *Knevett v. Poole*, Cro. Eliz. 463; *Vin. Abr. Emblements*; *Kingsbury*

(*j*) 1 Roll Abr. 727, pl. 12; *Barden's* case, 2 Leon. 54.

(*k*) 1 Roper's "Husband and Wife," 25, 2d ed.

(*l*) 2 Inst. 80; 20 Hen. III. c. 2 (Stat. of Merton); 1 Wms. Exors. 777, 6th edit.; *Fisher v. Forbes*, *Vin. Abr. tit. Emblements*, pl. 82.

(*m*) *Oland's case*, 5 Coke, 116.

CHAP. VI

stead of claims to emblements, the tenant shall continue to hold and occupy such farm or lands until the expiration of the then current year of his tenancy, and shall then quit, upon the terms of his lease or holding, in the same manner as if such lease or tenancy were then determined by effluence of time or other lawful means during the continuance of his landlord's estate; and the succeeding landlord or owner shall be entitled to recover and receive of the tenant, in the same manner as his predecessor or such tenant's lessor could have done if he had been living or had continued the landlord or lessor, a fair proportion of the rent for the period which may have elapsed from the day of the death or cessor of the estate of such predecessor or lessor to the time of the tenant so quitting, and the succeeding landlord or owner, and the tenant respectively, shall, as between themselves and as against each other, be entitled to all the benefits and advantages, and be subject to the terms, conditions, and restrictions to which the preceding landlord or lessor, and such tenant respectively, would have been entitled and subject in case the lease or tenancy had determined in manner aforesaid at the expiration of such current year: Provided always that no notice to quit shall be necessary or required by or from either party to determine any such holding and occupation as aforesaid." Upon the other hand, where the estate is for a term certain, so that the tenant would sow at his own risk, or where the tenant voluntarily determines the lease by his own act, he or his executors will not be entitled to the emblements. So where a tenant at will himself determines the estate, he will not be entitled (n). And where the estate is to determine upon some act of the tenant—as if he does waste (o), or if he incur a debt upon which judgment is signed (p)—and he does the act provided against, he will not be entitled to the emblements. So where a clergyman resigns his living, he is not entitled to emblements, for it is his own act (q). And where a woman, copyholder of certain land *durante viduitate sua*, according to the custom of the manor, sowed the land, and before severance of the emblements took a husband, it was adjudged that the lord should have the emblements, because the estate determined by the act of the lessee herself (r).

If the person claiming the crop be not the sower of the

(n) Litt. s. 68, 5 Coke, 116; Bulwer v. Bulwer, 2 B. & A. 470.

(o) Oland's case, 5 Coke, 116; Com. Dig. Biens, (G) 2; Wigglesworth v. Dallison, 1 Doug. 207.

(p) Davis v. Eyton, 7 Bing. 154.

(q) Bulwer v. Bulwer, 2 B. & Ald.

470.

(r) Oland's case, 5 Coke, 116 a.

crop, or his representative, he will not be entitled to the crop. Thus where a person who sows the land afterwards creates a life estate, the reversioner, and not the executor of the tenant for life, shall have the crop; and if a tenant for life sows land, and afterwards grants over his estate, the executor of the grantee shall not have the crop (*s*).

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As between an executor and a devisee, the emblements belong to the devisee, unless especially bequeathed to the executor (*t*).

The doctrine of emblements extends to roots planted and other *annual artificial* profits (*u*). It will not, therefore, extend to fruit-trees, oak, elm, and other trees, as these are not planted in anticipation of present immediate profit, and take more than a year to come to perfection (*v*); and so it was held not to extend to clover of which the crop was not to be taken within a year from the time of sowing it (*w*); nor will it extend to growing grass, for that is not an *artificial* product (*x*), unless it be artificial grass, such as clover and the like (*y*). Out of what claimed.

Where the tenant is entitled to emblements, he is also entitled to free ingress and egress to take them (*z*), and if he sell them, the purchaser will have the same right (*a*). But it has been said that this right of entry does not involve a right of occupation, and it is doubtful whether a personal representative of the tenant is not liable for rent, or to pay for the use and occupation if he occupies the land until the corn be ripe (*b*). In *Doe d. Nicholl v. M'Kaeg* (*c*), which was a case of a tenancy at will determinable instantaneously by demand of possession, it was held that the tenant, a dissenting minister, Entry to take them.

(*s*) 1 Roll Abr. 727, pl. 21; Knevelt v. Poole, Cro. Eliza. 463; Grantham v. Hawley, Hob. 132.

(*t*) Cooper v. Woolfitt, 2 H. & N. 122; Shep. Touch. by Preston, 472.

(*u*) Latham v. Attwood, Cro. Car. 515; Co. Litt. 55 b, note (*l*); Evans v. Roberts, 5 B. & C. 829, 832. It has been held to extend to teasels, Kingsbury v. Collins, 4 Bing. 202.

(*v*) Co. Litt. 55 b; Com. Dig. Biens, (G) 1.

(*w*) Graves v. Weld, 5 B. & Ad. 105.

(*x*) Co. Litt. 56 a; 1 Roll. Abr. 728; Com. Dig. Biens, (G) 1.

(*y*) Smith's L. & T. 2d edit. 349; and see Graves v. Weld, *supra*.

(*z*) Co. Litt. 56 a; Hayling v. Okey, 8 Ex. 531, 545.

(*a*) Shep. Touch. 244.

(*b*) Plowden's Queries, No. 239; 1 Wms. Exors. 679, 6th edit. See Strickland v. Maxwell, 2 Cr. & M. 539, which, however, was a case of special contract with respect to the crop; but see Beavan v. Delahay, 1 H. Bl. 5; Griffiths v. Puleston, 13 M. & W. 358, post, p. 233.

(*c*) Doe d. Nicholl v. M'Kaeg, 10 B. & C. 721.

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2. WHERE THERE IS A CONTRACT.

Where there is a contract.

The right to take what is called the away-going crop may become a matter of express contract between the parties, or the subject of an implied contract arising from the custom of the country (*e*). A custom for the outgoing tenant to be paid a reasonable compensation for tillage is a reasonable custom (*f*). Where the terms of the lease are inconsistent with the custom of the country, they will exclude it (*g*); but where they are not inconsistent, the custom may entitle the tenant to take the crop and to do everything which is necessary for that purpose (*h*), even when the lease is under seal (*i*). The custom will operate, unless it can be collected from the instrument, either expressly or impliedly, that the parties do not mean to be governed by it (*j*). If the lease contains no stipulation as to the mode of quitting the premises, the off-going tenant is entitled to his away-going crop according to the custom of the country, even though the terms of the *holding* be inconsistent with such custom, for the custom does not operate until the holding is determined (*k*). Where the custom of the country was that the tenant should have the way-going crop on the regular expiration of a Ladyday tenancy, the tenant entered on Ladyday, but the tenancy was determined on the 1st of June, it was held that the custom would not operate (*l*).

A strictly legal custom which has immemorially existed is not necessary, for a common usage of the neighbourhood, collected from what is usually done in cases of tenancies from

(*d*) "If he had entered for the sole purpose of removing his goods, and had continued there no longer than was necessary, and did not exclude the landlord, perhaps he might not have been a trespasser," *per* Lord Tenterden, C. J., delivering the judgment of the Court.

(*e*) *Wigglesworth v. Dallison*, 1 Doug. 201; 1 Smith L. C. 520, 6th edit.

(*f*) *Dalby v. Hirst*, 1 B. & B. 224; *Hutton v. Warren*, 1 M. & W. 466; *Senior v. Armytage*, Holt, 197.

(*g*) See *ante*, Covenants, part I., c. 4, s. 7.

(*h*) *Beavan v. Delahay*, 1 H. Bl. 5; *Boraston v. Green*, 16 East. 71; *Caldecott v. Smithies*, 7 C. & P. 808.

(*i*) *Wigglesworth v. Dallison*, 1 Doug. 201.

(*j*) *Hutton v. Warren*, 1 M. & W. 466, 477, where the authorities are collected; *Clarke v. Royston*, 13 M. & W. 466; *Wiltshire v. Cottrell*, 1 E. & B. 674; *Muncey v. Dennis*, 1 H. & N. 216.

(*k*) *Holding v. Pigott*, 7 Bing. 465; *Muncey v. Dennis*, 1 H. & N. 216.

(*l*) *Thorpe v. Eyre*, 1 A. & E. 926.

year to year, as well as from the usual course pursued where tenants hold under regular leases, is sufficient (*m*).

The tenant's interest in his way-going crop is not a mere easement, but a *possession*, which continues until the crop is carried away (*n*).

The person to whom the tenant is entitled to look by law for the value of the tillages, &c., is the landlord (*o*), but he may recover it from the incoming tenant if he has made a contract with him to that effect (*p*). Such a contract does not affect any of the existing rights of the landlord (*q*).

Under a clause that the tenant should be entitled to a way-going crop to be taken from the land, &c., and which way-going crop it was agreed should be left for the landlord or the incoming tenant at a valuation, it was held that the tenant had no right to reap the crop, he not having any interest distinct in that crop so as to be able to dispose of it, or to authorise any person but the landlord himself to take that crop. In reality the clause was nothing but a measure by which he might recoup himself (*r*).

If the outgoing tenant carries away the corn at the end of his term when he is not entitled to do so, the landlord may bring trover (*s*), but not the incoming tenant (*t*).

The settlement made between the landlord and the outgoing tenant is an equitable settlement of all matters between them, and the landlord is to be allowed the amount of rent due to him. If then the rent is paid by the incoming tenant, it is a payment made in discharge of a liability of the outgoing tenant, and may be set off against the claim of the outgoing tenant with respect to tillages (*u*).

The same remark which has been made, *ante*, pp. 84, 101,

(*m*) *Senior v. Armytage*, Holt, 197, Woodfall L. & T. p. 989, 10th edit.

(*n*) *Beavan v. Delahay*, 1 H. Bl. 5; *Griffiths v. Puleston*, 13 M. & W. 358.

(*o*) *Faviell v. Gascoyne*, 7 Ex. 273; *Mousley v. Ludlam*, 21 L. J. Q. B. 64.

(*p*) *Mouncey v. Dennis*, 1 H. & N. 216. The Agricultural Act scarcely mentions the incoming tenant at all (but see s. 9). Practically,

however, it is the incoming tenant who naturally pays for the improvements.

(*q*) *Petrie v. Daniel*, 1 Smith R. 199.

(*r*) *Per Bayley, B.*, in *Strickland v. Maxwell*, 2 Cr. & M. 539, 552.

(*s*) *Davies v. Connop*, 1 Price, 53.

(*t*) *Borraston v. Green*, 16 East.

80, 81 *per* Bailey, J.

(*u*) *Stafford v. Gardner*, L. R. 7 C. P. 242.

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viz., that a custom which is not inconsistent with the terms of the lease may be incorporated with the lease, extends to a custom to leave hay, straw, manure, &c., upon the premises, and to receive a compensation for them (*v*). Sometimes by the terms of the agreement the outgoing tenant may dispose of them to the incoming tenant (*w*), or such terms may be implied (*x*). Where the tenant is entitled to be paid a fair price for the straw, but nothing for the manure, he is only entitled to be paid for the straw at a fodder price, viz., one-half the market price (*y*). Where a tenant, who was bound to bring back dung for all hay sold and sent by him off the premises, sold some hay to a purchaser without informing him of the contract by which he was bound, it was held that the incoming tenant might refuse to let the purchaser remove the hay (*z*). Where the tenant is to bring back manure in lieu of hay or straw sold off the premises, it should be clearly expressed whether the manure is to be of the value of the straw, or only such a quantity as the straw sold would have produced (*a*). Where the lessee covenanted that he "should not nor would, *during the last year* of the term thereby granted, sell, &c., any hay, straw, or fodder, which should arise and grow in the said lands and farm," the covenant was held to extend to hay, &c., which had arisen and grown at any time during the term (*b*). A covenant to pay £10 per ton for "hay, straw, or other fodder," sold or taken away, was held to extend to hay unfit for food or for cattle (*c*). Where the outgoing tenant was to sell the manure to the incoming tenant at a valuation, it was held that the possession and property remained in him until the valuation was made, and the incoming tenant would be liable to an action of trespass if he removed it (*d*).

It is not inconsistent with a tenancy from year to year that the outgoing tenant shall be paid for the tillages on the determination of his tenancy (*e*).

(*v*) *Roberts v. Barker*, 1 C. R. & M. 808; *Dalby v. Hirst*, 1 Bro. & Bing. 224; *Hutton v. Warren*, 1 M. & W. 466.

(*w*) *Legh v. Lillie*, 6 H. & N. 165, 30 L. J. Ex. 25; *Hurst v. Hurst*, 4 Ex. 579; *Massey v. Goodall*, 17 Q. B. 310.

(*x*) *Faviell & Gascoyne*, 17 Ex. 273, 280; *Boraston v. Green*, *supra*.

(*y*) *Clarke v. Westrope*, 18 C. B. 765, 25 L. J. C. P. 287.

(*z*) *Smith v. Chance*, 2 B. & A. 753.

(*a*) *Lowndes v. Fountain*, 11 Ex. 487, 25 L. J. Ex. 49.

(*b*) *Gale v. Bates*, 3 H. & C. 84, 33 L. J. Ex. 235.

(*c*) *Fielden v. Tattersall*, 7 L. T. N.S. Ex. 718.

(*d*) *Beaty v. Gibbons*, 16 Rast. 116.

(*e*) *Brocklington v. Saunders*, 13 W. R. 46 Q. B.; *Onalov v. —*, 16 Ves. 173.

In a strict tenancy at will, if the lessor enters before sowing, the lessee will not have the costs of ploughing and manuring (*f*).

Where the custom is that the incoming tenant shall pay for the tillages, and shall be paid back again upon leaving, he may recover the amount from the landlord, if there be no new tenant coming in (*g*). But where the tenant took a farm for fourteen years, and in the first year said he would leave, and the landlord said he might, it was held that he was not entitled to tillages (*h*). It seems also that the custom would not apply where the term ceases upon the determination of the landlord's interest (*i*).

There is also another kind of compensation which a tenant may be entitled to claim, either by the custom of the country, or by express agreement, and that is for tillage bestowed upon the land, the benefit of which still remains unexhausted. As to this also, the same remark applies which has been made, *ante*, p. 234, viz., that the custom will operate where it is not inconsistent with the covenants of the lease (*j*).

3. COMPENSATION FOR IMPROVEMENTS.

The Agricultural Holdings Act, 1875 (*k*), does not prevent a landlord and tenant (*l*) from entering into any agreement they think fit (*m*), and they may adopt by reference any of the provisions of the Act (*n*).

In case of a tenancy from year to year, or at will existing on the 14th February 1876, the Act applies unless notice in writing be given by either party (*o*).

In all cases of tenancies commencing after the 14th February 1876, the Act applies unless excluded by agreement. The holding must be agricultural or pastoral, and of two acres (*p*).

A tenant cannot claim compensation in respect of the same

(*f*) Co. Litt. 55 a. n. 4.

(*g*) *Faviell v. Gascoyne*, 7 Ex. 273.

(*h*) *Whittaker v. Barker*, 1 Cr. & M. 113.

(*i*) See *Faviell v. Gascoyne*, *supra*; *Womersley v. Dally*, 26 L. J. Ex. 219.

(*j*) And see now as to compensation for improvements, *infra*.

(*k*) See the statute in Appendix.

(*l*) See s. 4, as to the interpretation of those two words.

(*m*) *Sa.* 54, 56, *ante*, p. 228.

(*n*) *S.* 55.

(*o*) *S.* 57.

(*p*) *Sa.* 56, 57.

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matter under this Act, and also under custom or contract (q). Except as expressed in the Act, no right of any landlord, or tenant or other person, is to be prejudicially affected (r).

When after the 14th February 1876 (s), a tenant makes an improvement (t), comprised in classes (1), (2), and (3), (see the statute in the Appendix), he is entitled on the determination of his tenancy.

In class (1), to the sum laid out with a proportionate deduction for every year up to twenty years when the improvement is to be taken as exhausted. (u)

In class (2), to the sum *properly* laid out with a proportionate deduction for every year up to seven years, when the improvement is to be taken as exhausted.

In class (3), to such proportion of the sum *properly* laid out as fairly represents the value to the incoming tenant, but at the end of two years he is not entitled to anything.

In class (1), the tenant must have previous consent in writing (v).

In class (1), deduction must be made for the sum necessary for putting the premises into tenantable repair (w).

In class (2), a tenant must give notice in writing of his intention to make improvements between forty-two days and seven days before beginning. If the improvement is executed after notice to quit, the tenant must have previous consent in writing (x).

In class (3), where any exhausting crop has been taken from the portion of the holding on which the improvement was made, the tenant is not entitled to compensation (y), or where additional value of manure by consumption of feeding stuff is claimed from the landlord or incoming tenant under the custom or an agreement (z).

In class (3), the tenant is entitled to the average amount of his outlay for like purposes during the three preceding

(q) S. 59.

(r) S. 60.

(s) S. 2.

(t) S. 5-9.

(u) In class (1), where the landlord at the time of consent was not absolute owner (see s. 4, that is one who can dispose of whole interest), for his own benefit, then the tenant is entitled to sum not exceeding the additional value to the holding.

(v) S. 10.

(w) S. 11. It is suggested that "tenantable repairs," means "tenantable repairs subject to the agreement of tenancy." See Sills. Ag.

Hold. Act.

(x) S. 12.

(y) S. 13.

(z) S. 14, and s. 59.

years, or other less number for which the tenancy has endured, subject to a deduction of the value of the probable loss of manure by selling certain crops within the last two years, or other less time for which the tenancy has endured, unless a proper return of manure has been made (a).

The following deductions are to be made :—

1. Taxes, rates, tithe rent charge.
2. Rent.
3. Landlord's compensation (b).
4. Any benefit allowed to the tenant in consideration of the improvement (c).

The tenant may claim compensation in respect of a breach of contract along with compensation for improvement (d).

Where the tenant commits waste or breach of contract, and claims compensation for improvement, the landlord may obtain compensation by counter claim, except in respect of a matter of husbandry committed more than four years before the determination of the tenancy (e).

Since it might sometimes happen that a landlord might pay his outgoing tenant for improvements, but in consequence of not re-letting, or from some other cause, might be unable to recoup himself, the Act provides a means of creating a charge upon the holding and for the assignment of such charge (f).

The provisions of this Act, respecting compensation, apply to cases of resumption of part of the holding by the landlord for the purpose of improvements (g).

(a) S. 15.

(b) S. 16.

(c) S. 17.

(d) S. 18.

(e) Sects. 19, 20-41, relate to procedure. The most noticeable points in these provisions appear to be as follows. By s. 20, notice of claim for compensation, and also counter notice must be given. By sect. 16, an appeal is given within seven days to the County Court against an award of referees where the claim exceeds £50, and the

judge may state a case at the request of either party. By s. 40 the costs are in the discretion of the Court. As to service of notices, see s. 41.

(f) Sa. 42, 43, 44. It seems the only mode of compelling payment of the charge is by a decree for sale. See Silla. Ag. Hold. Act. Sa. 45-50 relate to crown and charity lands. Sect. 49 is amended by the 39 & 40 Vict. c. 74, ss. 2, 3.

(g) S. 52. As to the notice to quit under this sect., see Notice to Quit, p. 211.

CHAPTER VII.

FIXTURES.

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Fixtures in
general.

IN general, chattels affixed to the reality become part of it, partaking of all its incidents and properties, and are called fixtures. Where there is no agreement to the contrary fixtures are usually the property of the landlord and not of the tenant, although the tenant may have affixed them (a).

Where, at the time of making a demise, nothing is said respecting the chattels affixed to the premises, the tenant will be entitled to the use of them during his tenancy as part of the demise, and the landlord cannot afterwards, during the term, remove them or insist upon their being valued and paid for (b).

It is a question of fact in each case whether the chattel is sufficiently annexed to the realty to form a part of it (c). This question depends principally upon two circumstances :—
1. The mode of annexation to the soil or fabric of the house, and the extent to which it is united to them, whether it can easily be removed, *intégrè, salvè, et commodè*, or not, without injury to itself or to the fabric of the building. 2. The object and purpose of the annexation, whether it was for the permanent and substantial improvement of the building (d), or merely for a temporary purpose, or the more complete enjoyment and use of it as a chattel (e). Machinery, and

(a) See Amos and Ferard on Fixtures; Elwes v. Maw, 2 Smith's L. C. 114, and cases therein cited. Co. Litt. 53 a. The word "fixtures" does not, however, necessarily refer only to things affixed to the freehold; Sheen v. Rickie, 5 M. & W.

175.
(b) Goff v. Harris, 5 M. & G. 573.

(c) Elwes v. Maw, 2 Smith's L. C. 14, and cases therein cited.

(d) 20 Hen. VII. c. 13.

(e) Hellowell v. Eastwood, 6 Ex. 295 (cotton mill), this case is explained in Holland v. Hodgson, L. R. 7 C. P. 328; Trappes v. Harter, 2 C. & M. 177 (calico-printers); Turner v. Cameron, L. R. 5 Q. 306, 39 L. J. Q. B. 125 (railway).

even buildings, so erected as not to be let into the soil nor annexed to it, do not lose their chattel character. Thus barns, granaries, sheds, or mills erected upon blocks, rollers, pattens, pillars, or plates, resting on brickwork, but not affixed to the freehold by being let into it or united to it by nails or otherwise, are not considered as fixtures, but as chattels removable by the tenant during the term, notwithstanding they may have sunk into the ground by their own weight (*f*). So a wooden mill or barn resting by its own weight on a brick foundation is not part of the freehold (*g*). If the roof of a building be annexed by a tenant to the freehold, although the roof is kept in its position merely by its own weight, and can be removed without injury to the walls on which it is sustained, yet, as the tenant has no right to remove the whole building, he cannot carry away the roof, which forms an essential part of the structure (*h*). Movable articles are sometimes considered to be constructively annexed to the structure to which they belong. The doors and windows of a house, or the gate of a field suspended on hooks, keys, winches, rings, and other things necessary for the convenient use of fixtures, have been held to pass with the fixtures to which they are appurtenant (*i*). Where a fixture is severed from the freehold for a special and temporary object it does not lose its original character of a fixture. Thus a millstone taken from a mill for the purpose of being picked and hammered is not distrainable (*j*).

The general rule, that whatever is affixed to the freehold becomes parcel of it, is subject to many conceptions. Tenant's fixtures are those which a tenant has, during his term, annexed to the demised premises, and which may be removed by him during the term (*k*). Such are fixtures erected by the tenant for the purposes of (1) trade or agriculture; and sometimes, if combined with other purposes, (2) ornament and convenience; (3) fixtures removable by statute.

(*f*) *Huntly v. Russell*, 13 Q. B. 572.

(*g*) *Rex v. Otley*, 1 B. & Ad. 161 (windmill); *Wansborough v. Maton*, 4 A. & E. 884 (wooden barn). See also *Dean v. Allalley*, 3 Esp. 11 (sheds); *Penton v. Robart*, 4 Esp. 33 (varnish shed); *Fitzherbert v. Shaw*, 1 H. Blac. 258 (stables, sheds, post, and rails); *Martin v. Roe*, 26 L. J. Q. B. 129 (boathouses).

(*h*) *Wansborough v. Maton*, 6 A. & E. 884-889.

(*i*) *Lilford's case*, 11 Rep. 50 b.; *Pyot v. St. John*, Cro. Jac. 329, 2 Bulst. 102, Shep. Touch. 470.

(*j*) *Wigatow's case*, Year-book, 14 Hen. VIII. fo. 25, pl. 6; *Gorton v. Falkner* 4 T. R. 567 (cotton looms); *Place v. Fagg*, 4 M. & Ry. 277 (millstones and gear). See *supra*, tit. Distress, p. 197.

(*k*) *Hallen v. Runder*, 1 C. M. & R. 275; *Elliot v. Bishop*, 10 Ex. 508.

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(1.) *Trade or Agriculture.*

Trade or agriculture.

The right of the tenant to remove fixtures set up by him for the purposes of his trade, and the ground upon which this privilege was based, was plainly stated by Lord Holt, C. J., in Poole's case (*l*), where it was held that a soap-boiler might well remove vats set up by him for the purposes of his trade, and this he might do by the common law, and not by virtue of any special custom in favour of trade and to encourage industry (*m*).

This right of the tenant has been greatly extended by subsequent cases, principally upon the ground of the benefit to the public (*n*). Trade fixtures form part of the land and pass by a conveyance of it, but they are subject to the right of removal by the tenant (*o*).

Mr. Amos, in his work on Fixtures (*p*), after examining the authorities, says: "The following rule, however, may perhaps be found to be most consistent with the adjudged cases. That things which a tenant has fixed to the freehold for the purposes of trade or manufacture may be taken away by him, wherever the removal is not contrary to any prevailing practice; where the articles can be removed without causing material injury to the estate; and where, in themselves, they were of a perfect chattel nature before they were put up, or at least have in substance that character, independently of their union with the soil; or, in other words, where they may be removed without being entirely demolished, or losing their essential character or value. If an erection, put up in relation to trade, construction, or mode of annexation, it is a fixture which a tenant is privileged to remove. It is not, however, meant to be inferred, that because in any particular instance these circumstances do not all concur, therefore an article cannot be

(*l*) Salk. 368.

(*m*) Per Lord Holt, C. J., as to reasons given for this privilege in the earlier cases. See Amos on Fixtures, 22-27; 2 Smith's L. C. 5th edit. 161.

(*n*) See Amos on Fixtures, p. 32, and the cases there cited; Penton v. Roberts, 2 East. 90; Com. Dig. Waste, (D) 2, 2 Saund. 259 n. 11. Per Tindal, C. J., in Mansfield v.

Blackburne, 6 Bing. N. C. 439 (salt-pans); Elwes v. Maw, 3 East. 38, 54 (farm and trade buildings); Heap v. Barton, 12 C. B. 274 (stabling, &c.); Fisher v. Dixon, 12 Cl. & F. 312 (colliery).

(*o*) Climie v. Wood, L. R. 4 Ex. 328; Holland v. Hodgson, L. R. 7 C. P. 328.

(*p*) Page 48.

removed by the tenant. On the contrary, it is not inconsistent with some of the decisions to say, that things may be removable, although these requisites are not completely fulfilled. And, indeed, when the liberality with which the Courts have generally been disposed to construe the indulgence in favour of trade is considered, it is not improbable that they would extend the privilege even to cases where not one of these conditions is found to be satisfied. The rule, therefore, here proposed is only offered as an affirmative one, that wherever the above-mentioned circumstances do concur, there an article may confidently be pronounced to belong to the tenant. And although it may be thought that this rule is too narrow to be of much practical utility, still no other could safely be laid down; because, upon looking into the judgments of the Courts, it is impossible not to see that, in a disputed claim between landlord and tenant, the absence of any one of the requisites which have been mentioned might, with propriety, be urged against the exercise of the tenant's right."

It has been held that a tenant may lawfully remove vessels and utensils of trade, such as furnaces, coppers, brewing vessels, fixed vats, salt-pans, tables, partitions, and the like (*q*); machinery in breweries, collieries, mills, &c., as steam-engines, cider-mills, and the like (*r*). Also *certain* buildings for trade, such as a varnish-house, at least if they are built on plates laid on brickwork (*s*). So sheds or buildings, called Dutch barns, formed of uprights, rising from a foundation of brickwork, may be removed (*t*). It has not been established that a tenant may remove substantial and extensive additions to the premises, although he may have built them for the convenience of his trade, such as limekilns (*u*), pottery or brickkilns, workshops, storehouses, and other buildings; nor indeed is it clearly determined that trade erections of a less substantial kind are in all cases removable by the tenant. Looms of a worsted mill which, although fastened by nails, could be easily removed, the object of setting them up being to enhance the value of the premises, are tenant's fixtures (*v*).

(*q*) Poole's case, 1 Salk. 368; Lawton v. Lawton, 3 Atk. 13; Lord Dudley v. Lord Warde, Amb. 114; Lawton v. Salmon, 1 H. Bl. 259; Elwes v. Maw, ante, p. 240; Mansfield v. Blackburne, ante, p. 240; Fisher v. Dixon, ante, p. 240; Walmsley v. Milne, 7 C. B. N.S. 115. (*r*) 3 Atk. 12 Amb. 114, 3 East. 53; Davis v. Jones, 2 B. & Ald. 165 (warehouse jibs).

(*s*) Penton v. Robart, ante, p. 239. (*t*) Dean v. Allalley, ante, p. 239. See 3 East. pp. 47, 55, 56.

(*u*) See Thresher v. East London Waterworks Co., 2 B. & C. 608 (lime-kilns); judgment of Lord Brougham in Fisher v. Dixon, ante, p. 240; Niblett v. Smith, 4 T. R. 504 (lime-kilns).

(*v*) Holland v. Hodgson, L. R. 7 C. P. 328.

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Distillery tanks forming the roofs of rooms, mash-tuns, &c., connected by pipes to reservoirs, &c., were held not to be fixtures (*w*). Cases, therefore, of this description are subject to doubt, wherever the removal of the article would deteriorate the freehold to which it is attached; or where the structure or substance of the thing itself would be destroyed in the removal (*x*). It would seem, however, that a building accessory to the principal thing—*e.g.*, an engine-house built to shelter a removable engine—might be removed (*y*).

Agricultural
fixtures.

At common law a tenant in husbandry has not the same privilege as a tenant in trade; for he cannot take away fixtures which he has affixed to the demised premises at his own expense, for purposes which are merely agricultural. Thus it has been held that a tenant cannot remove a beast-house, carpenter's shop, fuel-house, cart-house, pump-house, or fold-yard wall, erected for the use of his farm, even though he leaves the premises exactly in the same state as he found them on his entry (*z*). This rule, however, is confined to articles of a strictly agricultural nature. For if the object and purpose of an erection has also relation to a trade of any description, the tenant may take it away, notwithstanding it is the means of obtaining the profits of land, subject to the principles before stated in the case of trade fixtures. Thus a tenant may take away a mill for making cider (*a*); or machinery for working mines and collieries (*b*); or, it would seem, utensils set up by the tenant for *manufacturing* salt from springs on the demised premises (*c*). So a nurseryman or gardener is entitled to remove and dispose of young trees and shrubs which he has planted for the purpose of sale (*d*). So it would seem that a tenant might remove fruit-trees also, although of full bearing age, if they are nursery-trees, such as he might fairly deal with in his trade (*e*). But it has been held that a tenant of garden ground could not plough up *strawberry beds*, although he had purchased them, and

(*w*) *Chidley v. Churchwardens of West Ham*, 32 L. T. N.S. 486.

(*x*) *Fisher v. Dixon*, *ante*, p. 240; *Walmsley v. Milne*, 29 L. J. C. P. 97 (steam-engine, boiler, hay-cutter, grind-stones); *Whitehead v. Bennett*, 27 L. J. Ch. 474 (vats, &c.); *Foley v. Addenbrooke*, 13 M. & W. 174 (iron furnaces, &c.).

(*y*) *Elwes v. Maw*, *ante*, p. 240.

(*z*) *Elwes v. Maw*, 3 East 38. See judgment of Lord Ellenborough, 2 Smith L. C. 164, and notes.

(*a*) *Lawton v. Lawton*, 3 Atk. 12;

but see *Fisher v. Dixon*, *ante*, p. 240; *Walmsley v. Milne*, *ante*, p. 241.

(*b*) *Lord Dudley v. Lord Warde*, Amb. 113.

(*c*) *Lawton v. Salmon*, 1 H. Blac. 259, *in notis*. See Amos on Fixtures, 60-63.

(*d*) *Wyndham v. Way*, 4 Taunt. 316, *per* Heath, J. See *Lee v. Risdon*, 7 Taunt. 190, and *Penton v. Robart*, *ante*, p. 239.

(*e*) *Wardell v. Usher*, 3 Scott's N. Rep. 508.

although there was a practice to pay for such plants as CHAP. VII.
between outgoing and incoming tenants (f).

(2.) *Convenience or Ornament.*

There are five circumstances most material to be considered in ascertaining whether the tenant may remove fixtures which he has put up for ornament, or for the convenience of his occupation, viz., 1. That the article was one of domestic convenience, and not part of the architectural design. 2. That it was erected by the tenant. 3. That it could be moved entire. 4. That it was but slightly fixed. 5. That the question was between landlord and tenant. Convenience or ornament.

A tenant has been allowed to remove fixtures put up for convenience or ornament, and which are of such a description as to be capable of being disannexed without any permanent injury to the inheritance, such, for instance, as stoves and grates fixed into the chimney with brickwork, and marble chimneypieces and wainscot, fixed with screws (g). In *Grymes v. Boweren* (h), a tenant was allowed to take away a pump which was attached to a stout perpendicular plank resting on the ground at one end, and at the other end fastened to the wall by an iron pin, which had a head at one end and a screw at the other, and went completely through the wall. The judgment of the Lord Chief-Justice Tindal in that case contains a good summary of the law with regard to this class of fixtures:—"It is difficult to draw any very general, and, at the same time, precise and accurate, rule on this subject; for we must be guided, in a great degree, by the circumstances of each case, the nature of the article, and the mode in which it is fixed. The pump, as it is described to have been fixed in this case, appears to me to fall within the class of removable fixtures. The rule has always been more relaxed as between landlord and tenant than as between persons standing in other relations. It has been holden that stoves are removable during the term, and grates, ornamental chimneypieces, wainscots, fastened with screws, coppers, and various other articles; and the circumstances that, upon a change of occupiers, articles of this sort

(f) *Wetherell v. Howells*, 1 Camp. 237. This case was decided on the ground that the ploughing up of the plants was an injury maliciously done to the reversion, and that the plants were not removed by the tenant for sale in his ordinary occupation.

(g) See *Lawton v. Lawton*, 3 Atk. 13; *R. v. St Dunstan*, 4 B. & C. 686 (dwelling-house); *Colegrave v. Dias Santos*, 2 B. & C. 76 (dwelling-house).

(h) 6 Bing. 437.

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are usually allowed by landlords to be paid for by the incoming tenant to the outgoing tenant, is confirmatory of this view of the question. Looking at the facts of this case, considering that the article in dispute was of domestic convenience, that it was slightly fixed, was erected by the tenant, could be moved entire, and that the question is between the tenant and his landlord, I think the rule should be made absolute."

The following articles have been held to fall within this class of tenants' fixtures:—Hangings, tapestry, pier-glasses, chimney-glasses, and iron backs to chimneys (*i*); beds fastened with ropes or nails to the ceiling (*j*); stoves, mash-tubs, locks, bolts, and blinds (*k*); cupboards standing on the ground and supported by holdfasts (*l*); coffee-mills and malt-mills (*m*); iron ovens, clock cases (*n*); carpets attached to the floor by nails, for the purpose of keeping them stretched out, curtains, pictures, and other like matters of an ornamental nature which are slightly attached to the walls of the dwelling-house as furniture (*o*). So where a rector erected in the garden of the rectory two hothouses apart from and unconnected with the rectory, and which consisted of a brick wall two feet from the ground, upon which was placed a frame and glasswork, it was held that the frame and glasswork being removable without injury to the freehold, passed as a personal chattel to his executors (*p*). But where a conservatory was erected by a tenant on a brick foundation attached to the dwelling-house, and communicating with it by windows opening into the conservatory, and a flue passing into the parlour chimney, it was held that it became part of the freehold, and could not be removed (*q*). Fruit-trees and shrubs planted by the tenant, not in the way of his trade, are not removable by him (*r*); nor even a border of box or flowers (*s*).

(*i*) *Beck v. Rebow*, 1 P. Wms. Elliott, 10 Ex. 496, in error, 11 Ex. 94; *Harvey v. Harvey*, 2 Str. 1141.

(*j*) *Noy's Maxims*, 167, 9th ed.; 26 L. J. Q. B. 129.

(*k*) *Colegrave v. Dias Santos*, 2 B. & C. 76.

(*l*) *Reg. v. St. Dunstan*, 4 B. & C. 686.

(*m*) *Reg. v. Inhabitants of Loundthorpe*, 6 T. R. 377. The mill was clearly a chattel in this case.

(*n*) 4 Burns' Eccl. Low, 411, 9th edit.

(*o*) See judgment in *Hellawell v. Eastwood*, 6 Ex. 313; *Bishop v. Elliott*, 10 Ex. 496, in error, 11 Ex. 113 (public-house).

(*p*) *Martin v. Roe*, 7 E. & B. 237, 26 L. J. Q. B. 129.

(*q*) *Buckland v. Butterfield*, 2 Bro. & Bing. 54. See the judgment of Dallas, C.J. See also *Martin v. Roe*, 7 E. & B. 237, 26 L. J. Q. B. 129; *West v. Blakeway*, 2 M. & G. 729; *Jenkins v. Gething*, 2 J. & H. 520; *Penry v. Brown*, 2 Starkie, 403 (veranda).

(*r*) *Wyndham v. Way*, 4 Taunt. 316.

(*s*) *Empson v. Soden*, 4 B. & Ad. 65.

(3.) *Removable by Statute.*

Now by the 14 & 15 Vict. c. 25, s. 3, "If any tenant of a farm or lands shall, after the passing of this Act, with the consent in writing of the landlord for the time being, at his own cost and expense, erect any farm building, either detached or otherwise, or put any other building, engine, or machinery, either for agricultural purposes, or for the purposes of trade and agriculture (which shall not have been erected or put up in pursuance of some obligation in that behalf), then all such buildings, engines, and machinery shall be the property of the tenant, and shall be removable by him, notwithstanding the same may consist of separate buildings, or that the same, or any part thereof, may be built in, or permanently fixed to the soil, so as the tenant making any such removal do not in anywise injure the land or buildings belonging to the landlord, or otherwise do put the same in like plight and condition, or as good plight and condition, as the same were in before the erection of anything so removed: Provided, nevertheless, that no tenant shall, under the provision last aforesaid, be entitled to remove any such matter or thing as aforesaid, without first giving to the landlord, or to his agent, one month's previous notice in writing of his intention so to do; and thereupon it shall be lawful for the landlord, or his agent on his authority, to elect to purchase the matters and things so proposed to be removed, or any of them, and the right to remove the same shall thereby cease, and the same shall belong to the landlord; and the value thereof shall be ascertained and determined by two referees, one to be chosen by each party, or by an umpire to be named by such referees, and shall be paid or allowed in account by the landlord who shall have so elected to purchase the same." After the 14th February 1876 tenants' fixtures are removable except such as under the Agricultural Holdings Act or otherwise entitle the tenant to compensation, or have been so affixed in pursuance of some obligation, or instead of some fixture belonging to the landlord. Provided (1) the tenant has paid all rents and performed all obligations; (2) he shall not do any avoidable damage in the removal; (3) he shall make good all damage; (4) shall give one month's previous notice in writing; (5) landlord may elect to purchase. The section does not apply to a steam-engine erected without notice in writing, or to the erection of which the landlord has objected by notice in writing. (See sect. 58 of the statute in Appendix.)

Removable by statute.

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When to be removed.

In general, a tenant must remove his fixtures before the expiration of his tenancy (*t*). In *Lyde v. Russell* (*u*), this rule was expressly recognised and approved by Lord Tenterden, C. J., who added, "According to these authorities, then, the property in fixtures which would be in the tenant if he removed them during the term, vests in the landlord on the determination of the term." Sometimes a tenant under certain circumstances may retain his right of removing his fixtures, where he continues in possession after the expiration of his tenancy, and this would seem (*v*) to depend upon the question whether he had intended to abandon his property in the fixtures. But even in this case the tenant may be liable to an action at the suit of his landlord for being on the premises after his tenancy has expired (*w*). If the tenant retain possession of the demised premises, he will be allowed to remove his fixtures after the actual determination of his tenancy (*x*). And where the tendency is determined by the death of the lessor (*y*). But where steam-engines were removable by the lessee, and had not been removed previously to the lessor entering for a forfeiture, it was held that trover could not be maintained for them (*z*). So where a lessor re-enters for a forfeiture, by reason of the tenant having become a bankrupt, the bankrupt or his assignees cannot afterwards sever and remove any fixtures (*a*), except in pursuance of a special stipulation in that behalf (*b*). So where a lessor recovers possession under an ejectment for a forfeiture, the tenant has no right afterwards to sever and remove any fixtures (*c*). Where the purchaser of lands having brought an ejectment against the tenant from year to year, the parties entered into an agreement that judgment should be signed for the plaintiff, with a stay of execution till a given period; it was held that the tenant could not in the interval remove buildings, &c.,

(*t*) *Poole's case*, 1 Salk. 386; *Ex parte Quincey*, 1 Atk. 477; *Dudley v. Warde*, Amb. 113; Year-books, 20 Hen. VII. 13, 21; Hen. VII. 26; *Minshall v. Lloyd*, 2 M. & W. 450; *Pugh v. Arton*, L. R. 8 Eq. 626.

(*u*) 1 B. & Ad. 394.

(*v*) See judgment of Lord Kenyon, C.J., in *Penton v. Robart*, *ante*, p. 239; *Hallen v. Runder*, *ante*, p. 239.

(*w*) *Penton v. Robart*, *ante*, p. 300.

(*x*) *Weeton v. Woodcock*, 7 M. & W. 14, *per* Parke, B., in *Mackintosh v. Trotter*, 3 M. & W. 184, as to a tenant at will removing his furniture. See *ante*, p. 231. Emblements.

(*y*) *Heap v. Barton*, 12 C. B. 278; *Martin v. Roe*, 7 E. & B. 237.

(*z*) *Minshall v. Lloyd*, *supra*; *Mackintosh v. Trotter*, 3 M. & W. 184. But see *Sumner v. Bromilow*, 34 L. J. Q. B. 130.

(*a*) *Weeton v. Woodcock*, *supra*; *Pugh v. Arton*, L. R. 8 Eq. 626.

(*b*) *Stansfield v. The Mayor of Portsmouth*, 4 C. B. N.S. 120, 27 L. J. C. P. 124; *Sumner v. Bromilow*, *supra*.

(*c*) *Minshall v. Lloyd*, *supra*; *Mackintosh v. Trotter*, *supra*. But see *Sumner v. Bromilow*, *supra*.

from the premises which he had himself erected during his term, and before the action was brought (*d*). Where the landlord, during the term, by letter declined to buy the tenant's fixtures, but added, "I have no objection to your leaving them on the premises, and making the best terms you can with the incoming tenant;" such letter was held not to operate as a valid licence (it not being under seal); and if the new tenant refuse to pay for the fixtures so left, or to permit them to be removed, no action of trover will lie for them, whilst they remain unsevered from the freehold (*e*).

Where the trustees of an insolvent lessee had sold the fixtures to the plaintiff under a condition that they were to be removed in two days, and allowed the plaintiff to let them remain whilst he was negotiating for a lease and the landlord relet the premises and the plaintiff applied to him a fortnight afterwards for the fixtures, it was held that he had not lost his right to them by delay (*f*).

Where a tenant removes fixtures he must repair the injuries which he has done to the freehold by the removal (*g*). Under the Agricultural Holdings Act also, as we have seen (*h*), the tenant is not to do any avoidable damage, and is to make good all damage which he may do.

If there is an express agreement between the landlord and tenant respecting fixtures, the rules and principles before stated will of course be overruled by that agreement. Thus if a tenant covenants to repair the demised premises and all erections built or that may be afterwards built thereon, such covenant will prevent the tenant from taking down an erection put up by himself for the purpose of his trade (*i*). So where

(*d*) *Fitzherbert v. Shaw*, 1 H. Blac. 258; *Heap & Barton, ante*, p. 246.

(*e*) *Roffey v. Henderson*, 17 Q. R. 574; *Leader v. Homewood*, 5 C. B. N.S. 546.

(*f*) *Saint v. Pilley*, L. R. 10 Ex. 137.

(*g*) See *Woodf., L. & T.* 535, and see the Report of Commissioners on Fixtures.

(*h*) *Ante*, p. 246.

(*i*) See the following cases:—*Naylor v. Collinge*, 1 Taunt. 19; *Thresher v. East London Waterworks Co.*, 2 B. & C. 608; *Dean v. Allalley*, 3 Esp. 11; *Earl of Mans-*

field v. Blackburne, 6 Bing. N. C. 426; *Penry v. Brown*, 2 Starkie. 403; *West v. Blakeway*, 2 M. & G. 729, 9 Dowl. 846; *Haslett v. Burt*, 18 O. B. 162, 893, 25 L. J. C. P. 201, 295; *Wilson v. Whately*, 1 J. & H. 436, 7 Jur. N.S. 908; *Dumergue v. Rumsay*, 2 H. & C. 777, 33 L. J. Ex. 88; *Storer v. Hunter*, 3 B. & C. 368; *Clark v. Crownshaw*, 3 B. & Ad. 804; *Horn v. Baker*, 9 East. 215, 2 Smith L. C. 161, 4th edit.; *Fairburn v. Eastwood*, 6 M. & W. 679; *Foley v. Addenbrooke*, 13 M. & W. 174, *Amos on Fixt.* 90; *Reg. v. Topping*, M'Clel. & You. 544; *Martyr v. Bradley*, 9 Bing.

How to be removed.

Where there is an agreement.

CHAP. VII. the lessee has covenanted to deliver up the premises at the end of the term, together with all dues, &c., and all other things which now are, or any time during the said term shall be, fixed or fastened to the freehold, he has no right to remove trade fixtures (*k*). So where the tenant covenanted to erect certain machinery in the demised buildings, and to keep the *buildings and machinery* in repair, and to deliver up the *buildings* at the end of the term, it was held the machinery being practically not removable that it became a landlord's fixture (*l*).

Or custom may sometimes regulate the relative rights of landlord and tenant with regard to fixtures (*m*). But any such custom will be set aside by an express agreement inconsistent with it (*n*). Therefore, before a tenant severs an article from the freehold, it is necessary that he should examine his claim, not only with reference to the general law of fixtures, but also as it may be affected by any covenant or stipulation in his lease, or by any custom. If a tenant, at the expiration of his term, is desirous of renewing it, or if he enters into any fresh agreement respecting the premises, he should be careful to make a stipulation as to his fixtures, otherwise by making such fresh engagement he may lose his property therein (*o*).

Contract with respect to the sale or mortgage of fixtures.

When a tenant, at the commencement of his term, purchases of the landlord articles affixed to the premises, his right of removal depends on the contract between them. In a contract which concerns realty as well as fixtures, if it is intended that the fixtures should be paid for separately, a stipulation to that effect should be inserted (*p*); for without such stipulation fixtures would pass to the vendee like timber upon land (*q*). Contracts for the sale of fixtures are not within the Statute of Frauds, as they are not goods or chattels within the meaning of the statute; nor do they, although annexed to the freehold, constitute an interest in

24; *Bishop v. Elliott* (in error), 11 Ex. 113, 24 L. J. Ex. 229. The Court below decided that the lessee had the right to sell only the trade fixtures; *Elliott v. Bishop*, 10 Ex. 496, 522, 24 L. J. Ex. 33; but the Judges were much divided in opinion; *Drake v. Braddyll*, 11 Cl. 217, 13 Price, 455.

(*k*) *Bidder v. Trinidad Petroleum Co.*, 17 W. R. 153.

(*l*) *Ex parte Daglish* L. R. 8 Ch. 1072; 42 L. J. Bank. 102.

(*m*) *Trappes v. Harter*, 4 Tyrwh. 603, S. C. 2 Cr. & M. 153; *Davis v.*

Jones, 2 B. & A. 165; *Wetherall v. Howells*, 1 Camp. 227; *Culling v. Tuffnall*, Bull. N. P. 34; *Wansborough v. Maton*, 4 A. & E. 884.

(*n*) *Wiltshire v. Cottrell*, 1 E. & B. 674.

(*o*) See *Amos on Fixtures*, 117. *Thresher v. East London Waterworks Co.*, 2 B. & C. 608.

(*p*) *Colegrave v. Dias Santos*, 2 B. & C. 86.

(*q*) *Crockford v. Alexander*, 15 Ves. 138; *Boydell v. M'Michael*, 1 C. M. & R. 177.

land (r). But a memorandum of the actual sales of fixtures requires a conveyance stamp, and it makes no difference that it is in the past tense (s). A reversionary interest in trade fixtures will pass by an agreement in writing though not under seal (t). Where a lessee, who had power to remove a greenhouse fixed to the freehold, agreed to sell the lease, together with the greenhouse and furniture, plants and crops, for a certain sum, but was afterwards unable to obtain the lessor's consent to the assignment of the lease, which was necessary; it was held that the contract was an entire one, and that the lessee could not sue for the price of the greenhouse (u). A steam-engine erected for the purpose of working a colliery, to be used by the lessee of such colliery during his term, but to be held as the property of the landlord subject to such use, was held not to pass to the assignees of the tenant on his bankruptcy, on the ground that it did not come within the description of "goods and chattels" in the 12 & 13 Vict. c. 105, s. 125, nor had the bankrupt the actual or apparent ownership (v). In a later case it was held that fixtures, part of which were erected before a mortgage and part afterwards, and which were by law removable as between landlord and tenant, as well as on the principle of the benefit of trade, passed to the mortgagee and not to the assignees of the bankrupt mortgagor under the same section (w). Where copper-roller manufacturers, being seised in fee of a mill and land, erected thereon steam-engines, machinery, &c., for the purpose of their trade, and then mortgaged in fee the mill and land, with all fixtures, &c., and afterwards became bankrupt; it was held that the mortgagees were entitled to all the machinery, &c., fixed to the freehold, and that the deed did not require to be registered as a bill of sale under the 17 & 18 Vict. c. 36 (x). But a mortgage of trade fixtures without the mill or land to which they are annexed is a mortgage of personal chattels within the meaning of 17 & 18 Vict. c. 36, as explained by sect. 7, which includes "fixtures and other articles capable of complete transfer by delivery" (y). And such fixtures will be deemed

(r) *Hallen v. Runder*, 1 C. M. & R. 275; *Lee v. Risdon*, 7 Taunt. 191; *Lee v. Gaskell*, 45 L. J. Q. B. 540.

(s) *Horsall v. Hey*, 2 Ex. 778.

(t) *Petrie v. Dawson*, 2 C. & K. 138.

(u) *Sleddon v. Cruickshank*, 16 M. & W. 71.

(v) *Coombes v. Beaumont*, 5 B. & Ad. 72, *ex parte Broadwood* *Id.* 631.

(w) *Ex parte Reynel*, 2 Mont. D. & De G. 443.

(x) *Mather v. Fraser*, 2 K. & J. 536, 25 L. J. Ch. 361; *Boyd v. Shorrock*, L. R. 5 Eq. 72, 37 L. J. Ch. 154, as to what are fixtures in the case of a mortgage of rolling mills. See *ex parte Astbury*, L. R. 4 Ch. 630.

(y) *Waterfall v. Peniston*, 6 E. & Bl. 876, 26 L. J. Q. B. 100.

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to be in the order and disposition of a mortgagor in the event of his bankruptcy, whilst he remains in possession thereof (2). The registration of the mortgage under the Bills of Sale Act (17 & 18 Vict. c. 36), makes no difference in this respect (a). Growing crops are not "personal chattels" within the meaning of the Bills of Sale Act (b). By a mortgage of a mill, the stones, tackling, and implements pass to the mortgagee (c). So do looms and other machinery fixed to the floor (d). So do trade fixtures which before or after the mortgage have been affixed to the freehold by the mortgagor for the purpose of trade, and not for the improvement of the inheritance, and which are capable of being removed without damage to the freehold (e). An equitable mortgage of a leasehold public-house with the fixtures therein, consisting of ordinary house fixtures and trade fixtures, will be sufficient to prevent any of them being in the order and disposition of the lessee on his becoming bankrupt (f). Under an equitable mortgage, by the simple deposit of at lease unaccompanied by any memorandum, the tenant fixtures will be included (g).

Valuation.

Upon the demise of a house, it is usually agreed between the landlord and tenant that the fixtures shall be taken at a valuation—i.e., such fixtures as a tenant would ordinarily be entitled to remove if he had put them up. It is expedient that such fixtures should be enumerated in the conveyance by schedule or otherwise, when it is intended that they should be paid for separately from the premises demised (h). If the landlord agrees to make an allowance for the fixtures at the end of the term, it would seem that those fixtures only should be valued which were paid for by the tenant at the commencement (i).

When it is agreed between an outgoing and incoming tenant that the fixtures on the premises are to be taken &

(2) *Whitmore v. Empson*, 23 Beav. 313, 26 L. J. Ch. 364.

(a) *Badger v. Shaw*, 2 E. & E. 472, 29 L. J. Q. B. 73; *Re Daniel, ex parte Ashby*, 25 L. T. R. 188.

(b) *Brantom v. Griffiths*, 46 L. J. Q. B. C. P. (c. a.) 408.

(c) *Place v. Fagg*, 4 M. & R. 277; *Ex parte Bentley re West*, 2 Mont. D. & D.

(d) *Boyd v. Shorrook*, *supra*; *Re Dawson, Tate, & Co.*, 16 W. R. 424.

(e) *Culwick v. Swindell*, L. R. 3

Eq. 249, 37 L. J. Ch. 173; *Climie v. Wood*, L. R. 3 Ex. 256, 37 L. J. Ex. 158; *Longbottom v. Berry*, L. R. 4 Q. B. 123; *Holland v. Hodgson*, L. R. 7 C. P. 328.

(f) *Ex parte Barclay*, 5 De G. M. & G. 403.

(g) *Williams v. Evans*, 23 Beav. 239.

(h) *Colegrave v. Dias Santos*, 2 B. & C. 76; *Thresher v. East London Waterworks*, 608.

(i) See *Amos on Fixtures*, 351.

a valuation, the broker should value such things to the incoming tenant as under the general law of fixtures are removable between a landlord and his tenant, and all fixed articles upon the premises falling within this description should be included in the valuation, although they may, in fact, have been originally purchased of the landlord by the outgoing tenant. But the outgoing tenant cannot insist on anything being appraised which, as against his landlord, he is not authorised by his lease to sever. If an incoming tenant agree with an outgoing tenant for the purchase of his fixtures, he should require that the landlord be made privy to the transaction, otherwise the incoming tenant may find that he has no right to remove them at the end of his tenancy (*j*). The rights of incoming and outgoing tenants are regulated in a great degree by custom (*k*). The valuation of the fixtures requires an appraisement stamp (*l*). A contract for the sale of fixtures amounting to an actual transfer must be stamped with an *ad valorem* stamp as a conveyance, but if not amounting to an actual transfer then with an agreement stamp (*m*). The removal by the tenant of fixtures to which he is not entitled is waste (*n*).

Upon a count for conversion the fixtures only could be recovered, and not the value of them as annexed (*o*). The price of them could not be recovered as for goods sold before removal (*p*), unless the tenant had sold them and given up possession to the purchaser (*q*). Trover might be maintained where fixtures were severed during the term (*r*).

Fixtures are personal chattels under the Bills of Sale Act (*s*).

(*j*) *Elliott v. Bishop*, 10 Ex. 496, 11 Ex. 113; *Burt v. Haslett*, 18 C. B. 162, 893. See *Minshall v. Lloyd*, 2 M. & W. 450.

(*k*) See *Davis v. Jones*, 2 B. & Ald. 165; *Wetherell v. Howells*, 1 Camp 227.

(*l*) *Amos on Fixtures*, 357. See Stamp Act, 1870, 33 & 34 Vict. c. 97.

(*m*) *Horsfall v. Key*, 17 L. J. Ex. 267; *Chanter v. Dickenson*, 6 Sc. N.R. 182.

(*n*) See *ante*, p. 176.

(*o*) *McGregor v. Hugh*, 21 L. T. N.S. 803.

(*p*) *Lee v. Risdon*, *ante*, p. 243;

Wilde v. Waters, 16 C. B. 637; *Dalton v. Whittam*, 3 Q. B. 961; *Lee v. Gaskell*, 45 L. J. Q. R. 540.

(*q*) *Hallen v. Runder*, 1 C. M. & R. 266; *Salmon v. Watson*, 4 Moo. 73; *Cocking v. Ward*, 1 C. B. 858, 5 C. B. 586.

(*r*) *Macintosh v. Trotter*, 3 M. & W. 184; *Dalton v. Whittam*, *supra*; *Lyde v. Russell*, 1 B. & Ad. 394.

(*s*) See *Holland v. Hodgson*, L. R. 7 C. P. 328; *Hawtrey v. Butlin*, L. R. 8 Q. B. 290; 42 L. J. Q. B. 163; but see *ex parte*, *Barclay*, L. R. 9 Ch. 609; 43 L. J. Bank, 137; *Meux v. Jacob*, L. R. 7 H. L. C. 481; 44 L. J. Ch. 481.

CHAPTER VIII.

RESUMPTION OF HOLDING FOR IMPROVEMENTS.

By the Agricultural Holdings Act, 1875, it is enacted, s. 52, that—

Where on a tenancy from year to year a notice to quit is given by the landlord with a view to the use of land for any of the following purposes :—

The erection of farm-labourers' cottages, or other houses with or without gardens ;

The providing of gardens for existing farm-labourers' cottages or other houses ;

The allotment for labourers of land for gardens or other purposes ;

The planting of trees ;

The opening or working of any coal, ironstone, limestone, or other mineral, or of a stone quarry, clay, sand, or gravel pit, or the construction of any works or buildings to be used in connection therewith ;

The obtaining of brick, earth, gravel, or sand ;

The making of a watercourse or reservoir ;

The making of any road, tramroad, siding, canal, or basin of any wharf, pier, or other work connected therewith ;

And the notice to quit so states, then it shall by virtue of this Act be no objection to the notice that it relates to part only of the holding (a).

In every such case the provisions of this Act respecting compensation (b) shall apply as on determination of a tenancy in respect of an entire holding.

The tenant shall also be entitled to a proportionate reduction of rent in respect of the land comprised in the notice to quit, and in respect of any depreciation of the value to him of the residue of the holding, caused by the withdrawal of

(a) See *ante*, p. 210.

(b) See *ante*, p. 235.

the land from the holding or by the use to be made thereof, and the amount of that reduction shall be ascertained by agreement or settled by a reference under this Act, as in the case of compensation (but without appeal).

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The tenant shall further be entitled at any time within twenty-eight days after service of the notice to quit, to serve on the landlord a notice in writing to the effect that he (the tenant) accepts the same as a notice to quit the entire holding, to take effect at the expiration of the then current year of tenancy ; and the notice to quit shall have effect accordingly.

PART IV.

CHANGE OF PARTIES.

CHAPTER I.

BY ACT OF THE PARTIES.

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A CHANGE of parties may take place either by the act of the parties themselves, as by assignment, attornment, or underletting, or by the operation of law, as through the death of either party, or through bankruptcy, marriage, or proceeding at law under a writ of execution.

I. BY LANDLORD.

Assignment.

A landlord may by deed assign his reversion (a), and the consequences of such assignment as they affect the covenants will be considered, *post*, ss. 3-5. So also he may mortgage his property subsequently to the making of the lease, and such mortgage will operate as an assignment of the reversion (b). So he may assign his property for the benefit of his creditors, but this will be considered under the title Bankruptcy, *post*, c. 2, s. 2.

Attornment.

An assignment by the landlord of his reversion was not

(a) *Beely v. Perry*, 3 Lev. 155. (b) *Rogers v. Humphrey*, 4 A. & E. 299, 313. See *post*.

perfected until his tenant in possession had recognised the assignee's title to be considered his landlord, and this recognition of title was called attornment. This, then, although an act done by the tenant, is merely a recognition of the act of assignment already done by the landlord.

By various Acts of Parliament restrictions against alienation have been removed, and principally by the Statute of *quia emptores* (18 Ed. I. c. 1), and the 12 Car. II. c. 24. The doctrine of attornment continued to a still later period, until, by the 4 & 5 Anne, c. 16, it was made no longer necessary to attorn in order to complete a grant or conveyance; and by the 11 Geo. II. c. 19, s. 11, the attornment of any tenant does not affect the possession of any lands, unless made with the consent of the landlord, or to a mortgagee after the mortgage is forfeited, or by direction of a court of justice.

By sect. 10 of the 4 & 5 Anne, c. 16, "No tenant shall be prejudiced or damaged by payment of any rent to any grantor or conusor, or by breach of any condition for non-payment of rent before notice shall be given to him of such grant by such grantee or conusee" (c).

A payment of rent by a tenant to his landlord before the day when it becomes due is not a payment of rent within this section; therefore, where a tenant paid two quarters' rent in advance to his landlord, in ignorance of an assignment by the landlord of his interest in the premises to a third person, it was held that the assignee, after notice of the assignment to the tenant, was entitled to distrain (d).

The effect of the statute of Anne is, therefore, to substitute a giving of notice for attornment (e).

Where the party comes in by judgment of law—*e.g.*, as tenant by *eligiti*—no attornment is necessary (f).

(c) See *Lumley v. Hodgson*, 16 J. C. P. 296, L. R. 5 C. P. 589; *East*, 99. In *Scaltock v. Harston*, ante, p. 182, it was attempted on the authority of *Mallory's case*, 5 Co. Rep. 113 b, to set up a want of notice of an assignment in an action of ejectment for a breach of a covenant to repair, but the court decided that the above section only applied to non-payment of rent.

(d) See *Moss v. Gallimore*, 1 Smith L. C. 5th edit. 542.

(f) *Lloyd v. Davies*, 2 Ex. 103. As to where, in an avowry or cognisance, it is necessary to aver an attornment, see *Vigers v. Dean* and Chapter of St. Pauls, 19 L. J. Q. B. 84.

(e) *De Nicols v. Saunders*, 39 L.

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An assignee of the reversion by way of mortgage can sue for rent, &c., without attornment; but a mortgagee before the lease is not in the position of assignee of the reversion until attornment (*g*). After attornment he may distrain for arrears of rent thereby admitted to be due (*h*).

It seems, however, that, without attornment, a notice by the mortgagee to pay rent, if it is acquiesced in by the tenant, would operate as an attornment (*i*).

Payment of rent may be evidence of an attornment, but the circumstances of the case may rebut the presumption of an attornment; as where rent was paid after notice of an adverse claim, though the precise nature of the claim was unknown (*j*).

An instrument whereby the tenant merely puts one person in the place of another as his landlord, without varying the terms or conditions of his holding, is an attornment; but if it varies the terms, &c., it will amount to an agreement (*k*).

The tenant who attorns is generally estopped from denying the title of the person to whom he has attorned (*l*).

There is a distinction, however, between the case where a tenant has actually received possession from one who has no title, and the case where he has merely attorned by mistake or fraud. In the former case, the tenant cannot, except under very special circumstances, dispute the title; in the latter he may (*m*).

Where a person having possession of land under a good title inadvertently attorns and pays rent to a stranger, he is

(*g*) *Evans v. Elliott*, 9 A. & E. B. & C. 471; *Doe d. Wright v. 342*. See the notes to *Moas v. Smith*, 8 A. & E. 255.

(*h*) *Gladman v. Plumer*, 15 L. J. Bing. 71; *Doe d. Marlow v. Wiggins*, 4 Q. B. 367; *Hill v. Saunders*, 4 B. & C. 529; *Cooke v. Loxley*, 5 T. R. 4.

(*i*) *Brown v. Storey*, 1 M. & G. 117. As to what is a sufficient notice, see *Cook v. Guerra*, *supra*.

(*j*) *Fenner v. Duploc*, 2 Bing. 10; *Gregory v. Doidge*, 3 Bing. 474; *Claridge v. Mackenzie*, 4 M. & G. 143.

(*k*) *Doe d. Lindsay v. Edwards*, 5 A. & E. 95; *Cornish v. Searel*, 8 B. & C. 471, *per* Bayley, J., 475, citing *Rogers v. Pitcher*, 6 Taunt. 202, and *Gravenor v. Woodhouse*, 1 Bing. 38. See also *Gregory v. Doidge*, 3 Bing. 174; *Doe d. Plevin v. Brown*, 7 A. & E. 447; *Brook v. Biggs*, 2 Bing. N.C. 572.

not estopped after the determination of the tenancy from setting up his own title in an ejectment by the landlord (n). CHAP. I.

2. BY TENANT.

A change of parties may take place by the tenant assigning his term, and the consequences of such an assignment will be considered, *post*, ss. 3, 4, 5. Assignment.

A change of possession takes place upon an underletting by the tenant; and with respect to underleases, it should be observed that the original lessee is liable upon the covenants entered into by him, although the under-lessee may have entered into similar covenants with the original lessee (o). It is the duty of the under-lessee to ascertain the contents of the original lease (p). Underletting.

An under-lease should contain an express covenant on the part of the under-lessee to perform all the covenants and conditions, &c., in the original lease, except such as it is not intended he should perform. It is not sufficient to insert in the lease similar covenants, even if couched in the identical words of the covenants of the original lease, for the covenants may not after all be the same, as they may begin to operate at different times, and so may vary substantially in their operation (q).

3. CONSEQUENCES OF ASSIGNMENT.

At common law, when the landlord assigned the tenant became bound to pay rent to the assignee, but the express covenants of the lease being distinct contracts, and only *choses in action*, did not pass, and neither lessee nor assignee could sue upon them (r). At common law.

By 32 Hen. VIII. c. 34, it was enacted, "That all persons being grantees or assignees to or by the King, or to or by any other persons than the King, and their heirs, executors, suc- By 32 Hen. VIII. c. 34.

(n) *Accidental Death Insurance Co. v. Mackenzie*, 9 W. R. 713, 5 L. T. N.S. 20.

(o) *Logan v. Hall*, 4 C. B. 598, 613, 624.

(p) *Cossar v. Collinge*, 3 Myl. &

K. 283; *Grosvenor v. Green*, 28 L. J. Ch. 173.

(q) See *Logan v. Hall*, *supra*.

(r) *Wms. Saund.* 240 a, note 2; 1 Smith L. C. 51, 6th edit.; *Martyn v. Williams*, 1 H. & N. 817, 826, 26 L. J. Ex. 117.

CHAP. I.

cessors, and assigns, shall have like advantage against the lessees, their executors, administrators, and assigns, by entry for non-payment of the rent, or for doing of waste, or other forfeiture, and by action only for not performing other conditions, covenants or agreements expressed in the indentures of leases, and grants against the said lessees and grantees, their executors, administrators, and assignees, as the said lessors and grantors, their heirs, or successors, might have had."

Sect. 2 enacted, "That all lessees and grantees of lands or other hereditaments for terms of years, life, or lives, their executors, administrators, or assigns, shall have like action and remedy against all persons and bodies politic, their heirs, successors, and assigns, having any gift or grant of the King, or of any other persons, of the reversion of the lands and hereditaments so letten, or any parcel thereof, for any condition or covenant expressed in the indentures of their leases, as the same lessees might have had against the said lessors and grantors, their heirs and successors."

Since this statute the assignee of the reversion and of the term stand in nearly the same position as the heir-at-law (*s*) and tenant formerly did, both with respect to covenants in law (*t*) and express covenants (*u*), and can sue and be sued accordingly. The statute applies to grantees of part of the reversion (*v*).

There are, however, some limitations to the operation of the statute. Causes of action which accrued previous to the assignment of the reversion will not pass with it (*w*). The statute does not extend to mere collateral covenants, but to such as run with the land (*x*). The statute only applies to leases by deeds, so that the assignee of the reversion upon a lease not under seal cannot sue upon the lease, nor is he bound by its terms (*y*), and the lessor in such case does not lose any of his rights of action against the lessee by assignment (*z*).

(*s*) See *Webb v. Russell*, 3 T. R. 393. *tyn v. Williams*, I. H. & N. 817, 26 L. J. Ex. 117.

(*t*) See *ante*, Part I, c. 4, s. 7. (*x*) *Webb v. Russell*, 3 T. R. 393. See *post*, sect. 4, p. 260.

(*u*) *Ibid*.

(*v*) *Rawlings v. Morgan*, 34 L. J. C. P. 185. (*y*) *Standen v. Christmas*, 10 Q. B. 135; *Elliot v. Johnson*, L. R. 2 Q. B. 120; *Smith v. Egginton*, L. R. 9 C. P. 115; 43 L. J. C. P. 140.

(*w*) *Hunt v. Bishop*, 8 Exch. 675, 22 L. J. Ex. 336; *Hunt v. Remnant*, 9 Exch. 635, 23 L. J. Ex. 135; *Martyn v. Parson*, 5 C. B. 920.

Where a lessee assigns his term, he enters into covenants that all has been done by him to maintain the lease; and the assignee, on his part, covenants to pay the rent, and perform the covenants in the lease, and save harmless the assignor (*a*), but not after the assignee has himself assigned to another (*b*).

A lessee continues liable in covenant to his lessor upon express (*c*) covenants, notwithstanding an assignment of the term and acceptance of rent (*d*), as well as to his assignee (*e*).

There is an implied promise on the part of each successive assignee of a lease to indemnify the original lessee against breaches of covenants in the lease committed by each assignee during the continuance of his own term; and such promise will be implied although each assignee expressly covenants to indemnify his immediate assignor against all subsequent breaches (*f*).

Where a lessee grants an under-lease, the rent and covenants will not pass to an assignee of the term merely, but must be expressly assigned (*g*).

An action of covenant will not lie against the assignee of a lessee for breaches committed after the assignee has assigned over to a third party (*h*), but he will be answerable for breaches committed before the assignment over (*i*).

Where the right of action is given to the assignee by the statute, the privity of contract is transferred, and it seems that the original covenantor cannot sue (*j*).

Mortgagees by assignment of a term, whether in possession

Assignments
by way of
mortgage.

(*a*) *Stains v. Morris*, 1 V. & B. Jac. 521; *Thursby v. Plant*, 1 Wms. 10; *Burnett v. Lynch*, 5 B. & C. Saund. 241.

(*b*) *Wolveridge v. Steward*, 1 Cr. 101; 42 L. J. Ex. (Ex. Ch.) 62.
& M. 644; *Crouch v. Tregoning*, 41 L. J. Ex. 97.

(*c*) It is said to be otherwise as to implied covenants. *Batchelor v. Gage*, 1 Sid. 447; *Sir. W. Jones*, 223; *Auriol v. Mills*, 4 T. R. 98; *Williams v. Burrell*, 1 C. B. 402.

(*d*) *Barnard v. Godscall*, Cro. Jac. 309; *Norton v. Acland*, Cro. Car. 579; *Glover v. Cope*, 4 Mod. 81; *Marsh v. Bruce*, Cro. Jac. 334; 1 Smith, L. C. 56, 6th edit.

(*e*) *Brett v. Cumberland*, Cro.

(*f*) *Moule v. Garrett*, L. R. 7 Ex. 101; 42 L. J. Ex. (Ex. Ch.) 62.

(*g*) *Franklin v. Howes*, 19 W. R. 581, 24 L. T. N. S. 348.

(*h*) *Taylor v. Shum*, 1 B. & P. 21; *Le Keux v. Nash*, Str. 1222; *Odell v. Wake*, 3 Camp. 394; *Onslow v. Corrie*, 2 Madd. 330. See *post*, c. 2, Death of Lessee.

(*i*) *Harley v. King*, 5 Tyrwh. 692.

(*j*) *Beeley v. Parry*, 3 Lev. 154; *Green v. James*, 6 M. & W. 656. See *Thursby v. Plant*, 1 Wms. Saund. 240.

CHAP. I.

or not, are liable to the performance of the covenants (*k*), and equity will not interpose to relieve them, even although they are willing to give up their money (*l*). The mortgagee should take an under-lease instead of an assignment, in order to avoid the liabilities of an assignee (*m*). Leases are frequently deposited as security for money lent (*n*), but such possession of the lease does not give a legal title (*o*). Where the holder of the lease had taken possession, it was held that there had been an equitable assignment, and the lessor might have a decree for specific performance of such covenants as ran with the land (*p*).

With respect to the effect of an assignment *pendent lite*, see Judicature Act, Order L., Rules 1-7, *post*, p. 265.

4. COVENANTS RUNNING WITH THE LAND.

Covenants
running with
the land.

The assignee of the reversion having by the statute (*q*) a right to sue the tenant, and the assignee of the term a right to sue the landlord upon covenants which *run with the land*, or which *touch and concern the thing demised*, it is necessary to consider what these covenants are.

All covenants in law (*r*), generally called implied covenants, run with the land (*s*).

There are many express covenants which run with the land.

Express covenants for payment of rent (*t*), for quiet enjoyment (*u*), for further assurance (*v*), for renewal (*w*), for repairs (*x*), and not to assign without license (*y*), run with the land.

(*k*) *Williams v. Bosanquet*, 1 B & B. 238; *Burton v. Barclay*, 7 Bing. 745.

(*l*) *Anon. Freem. Ch.* 253, and see the note to that case and the cases there cited.

(*m*) *Woodf. L. & T.* 210.

(*n*) *Williams v. Evans*, 23 Beav. 239; *Matthews v. Goodday*, 31 L. J. Ch. 382.

(*o*) *Doe d. Maslin v. Roe*, 5 Esp. 105.

(*p*) *Lucas v. Commerford*, 1 Ves. Junr. 235.

(*q*) *Ante*, p. 257.

(*r*) *Ante*, Part I, c. 1, s. 7, Implied Covenants (b).

(*s*) *Bac. Abr. tit. Covenant (E)*; *Vyoyan v. Arthur*, 1 B. & C. 410.

(*t*) *Parker v. Webb*, 3 Salk. 5.

(*u*) *Campbell v. Lewis*, 3 B. & A. 393; *Williams v. Burrell*, 1 C. B. 402.

(*v*) *Middlemore v. Goodale*, Cro. Car. 503.

(*w*) *Roe v. Hayley*, 12 East. 464; *Brook v. Bulkeley*, 2 Ves. Sen. 498; *Simpson v. Clayton*, 4 Bing. N. C. 758.

(*x*) *Dean and Chapter of Windsor's case*, 5 Co. 24; *Lougher v. Williams*, 2 Lev. 92; *Buckley v. Pirk*, 1 Salk. 317; *Wakefield v. Brown*, 9 Q. B. 209; *Martyn v. Clue*, 18 Q. B. 661.

(*y*) *Williams v. Earle*, L. R. 3 Q. B. 739, 37 L. J. Q. B. 231. It seems that this covenant will not run with the land unless "assigns" are mentioned. See *Philpot v. Hoare*, 2 Atk. 219, and the note to *West v. Dobb*, L. R. 4 Q. B. 637, *per* Blackburn, J.

So a covenant to maintain a sea-wall (z), that the lessee should constantly reside on the premises (a), that either party should have power to determine the lease (b), not to carry on a particular trade (c), to leave part of the land as pasture, or to cultivate in a particular manner (d), to produce title-deeds (e), to supply water to houses at a certain rate (f), runs with the land.

A covenant to insure premises within the operation of 14 Geo. III. c. 78, s. 83 (g), enabling the owner to have the sum insured laid out upon the premises, was held to run with the land (h).

Where in the *reddendum* there was a stipulation for doing suit to the mill of the lessor by grinding there all such corn as should grow on the premises, it was held that this was in the nature of rent, and was a covenant which ran with the land (i).

A covenant to repair and leave in repair all buildings, &c., which should be erected, was held to run with the land (j).

So a covenant to build a new mill in lieu of an old one was held to run with the land (k).

Where there was a covenant that fixtures and movable things should be kept in repair and restored, it was held that, so far as it related to fixtures, it ran with the land, but as to mere movables, it was otherwise (l).

A covenant relating to a way or other profit appurtenant goes with the land (m).

(z) *Morland v. Cook*, L. R. 6 Eq. 212, 267, 37 L. J. Ch. 825.

(a) *Tatem v. Chaplin*, 2 H. Bl. 133.

(b) *Roe v. Hayley*, 12 East. 464.

(c) *Per* Lord Ellenborough, in *Mayor of Congleton v. Pattison*, 10 East. 130; *Hunt v. Bishop*, 8 Ex. 675, 9 Id. 685.

(d) *Cockson v. Cook*, Cro. Jac. 125.

(e) *Barclay v. Raine*, 1 Sim. & St. 449.

(f) *Jourdain v. Wilson*, 4 B. & A. 266.

(g) See the 22 & 23 Vict. c. 35, s. 7.

(h) *Vernon v. Smith*, 5 B. & A. 1.

(i) *Vyvian v. Arthur*, 1 B. & C. 410.

(j) *Minshull v. Oakes*, 2 H. & N. 793, 27 L. J. Ex. 194. See *post*, p. 262.

(k) *Easterly v. Sampson*, 6 Bing. 644, 1 O. & J. 105. In this case "assigns" were named. See *infra*.

(l) *Williams v. Earle*, L. R. 3 Q. B. 739, 752. See also *Gorton v. Gregory*, 3 B. & S. 90, 31 L. J. Q. B. 302.

(m) *Cole's case*, 1 Show 388, 1 Salk. 196.

CHAP. I.
Use of word
"assigns."

In preparing covenants which are intended to run with the land, the "assigns" should always be mentioned; for there is a class of cases in which assigns are bound if mentioned, but not otherwise; and it is prudent to provide for the possibility of a covenant being held to belong to this class (*n*).

There appears to be considerable doubt as to whether a covenant relating to something not *in esse* will run with the land or not (*o*). Such a covenant, according to Spencer's case, will not run with the land unless the "assigns" be named. This decision was followed in many cases, and, amongst others, in the case of *Doughty v. Bowman* (*p*). The Court of Exchequer, however, thought the question whether the "assigns" were named or not was wholly immaterial, and, according to their view of the law, the sole question was whether the thing covenanted to be done would touch or concern the thing demised, or be merely collateral or personal (*q*). In a subsequent case in equity, *Turner, L.J.*, noticed that a covenant did not purport to bind the assigns, as though that would not be immaterial; but the case of *Minshull v. Oakes* does not appear to have been cited (*r*).

Covenants which are merely collateral or personal, or which relate only to the personal use and enjoyment of the land, and not to the permanent user of the land itself (*s*), do not run with the land, even if assigns are expressly named (*t*).

A covenant was contained in a deed of demise of a coal mine, under which the lessor claimed to distrain not only upon the land demised but upon other lands belonging to the lessee or his assigns, in which the lessor had no interest. The lands distrained upon had been assigned by the lessee to the plaintiffs; it was held that even if the covenant passed with the land to the assignee of the lessor or lessee it could not attach to other lands in which the lessor had no interest,

(*n*) Woodfall L. & T. 10th edit. 111. See note to *West v. Dobb*. L. R. 4 Q. B. 637.

(*o*) This question is discussed at length in the notes to Spencer's case. 1 Smith L. C. 46, 6th edit.

(*p*) *Doughty v. Bowman*, 11 Q. B. 444. See also *Greenaway v. Hart*, 1 C. B. 340, and *Mayor of Congleton v. Pattison*, 10 East. 130, *per Lord Ellenborough*, C. J.

(*q*) *Minshull v. Oakes*, 2 H. & N. 806, 27 L. J. Ex. 194.

(*r*) *Wilson v. Hart*, L. R. 1 Ch. Ap. 463, 466, 35 L. J. Ch. 569, 572.

(*s*) *Wilson v. Hart*, *supra*.

(*t*) *Spencer's case*, *supra*; Bac. Abr. tit. Covenant, (E) 2, 5; Att.-Gen. v. Cox, 3 H. L. Cas. 240; *Webb v. Russell*, 3 T. R. 393; *Stokes v. Russell*, 3 T. R. 678; *Russell v. Stokes*, 1 H. Bl. 562; *Plight v. Glossop*, 2 Bing. N. C. 125; *Mayor of Congleton v. Pattison*, 10 East. 130.

but as to such other lands was only personal to the covenantor (*u*).

Covenants which relate to mere movables do not run with the land (*v*).

A joint-covenant with tenants in common does not run with the land or with the reversion (*w*).

4. ASSIGNMENT OF PART.

An assignment may be made of a part of a reversion or term in the whole of the lands, or of the whole of the reversion or term as to part of the lands.

The 32 Hen. VIII. c. 34, has been held to apply to these cases, and an action of covenant will lie against the assignee (*x*).

An assignee of part of the estate demised, or the assignees of several parts jointly, or the assignee of five-sixths of the estate, being tenant in common with the assignee of the remaining sixth, may bring covenant (*y*).

The assignee of a part of the lands is not liable to be sued for the whole rent, but only for a proportional part (*z*).

The lessee who assigns is still liable for the entire rent, for he cannot apportion it, and the covenant is personal as to him (*a*).

Although covenants could be apportioned, yet it was otherwise at common law with respect to conditions (*b*). It

(*u*) *Daniel v. Stepney*, 41 L. J. Ex. 208, L. R. 9. Ex. 185.
 (*v*) *Williams v. Earle*, L. R. 3 Q. B. 739, 752; *Gorton v. Gregory*, 3 B. & S. 90, 31 L. J. Q. B. 302.
 (*w*) *Roach v. Wadham*, 6 East. 289; *Thompson v. Hakewill*, 19 C. B. N.S. 713, 720.
 (*x*) 1 Inst. 215 a; *Congham v. King*, Cro. Car. 221; *Kidwelly v. Brand*, Plowd. 69; *Twynam v. Pickard*, 2 B. & A. 105; *Yates v. Cole*, 2 Bro. & Bing. 660; *Wollaston v. Hakewill*, 3 M. & Gr. 297; *Wright v. Burroughes*, 3 C. B. 685; *Badeley v. Vigurs*, 4 E. & B. 71; *Palmer v. Edwards*, 1 Doug. 187 n; *Stevenson v. Lambard*, 2 East. 575.
 (*y*) Com. Dig. tit. Covenant, (B) 3; *Simpson v. Clayton*, 4 Bing. N. C. 758-780.
 (*z*) *Holford v. Hatch*, 1 Doug. 183; *Hare v. Cator*, Cowp. 765; *Curtis v. Spitty*, 1 Bing. N. C. 756; *Wollaston v. Hakewill*, *supra*.
 (*a*) *Broom v. Hore*, Cro. Eliz. 633; *Ards v. Watkin*, Cro. Eliz. 637; *Stevenson v. Lambard*, 2 East. 575, 579.
 (*b*) *Twynam v. Pickard*, 2 B. & A. 105.

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was, however, held that the assignee of part of the reversion in the whole of the land might avail himself of a condition, though the assignee of the whole reversion in a part of the land could not (c). But now, by the 22 & 23 Vict. c. 35, s. 3, where the reversion upon a lease is severed, and the rent or other reservation is equally apportioned, the assignee of each part of the reversion shall, in respect of the apportioned rent or other reservation allotted or belonging to him, have and be entitled to the benefit of all conditions or powers of re-entry for non-payment of the original rent, or other reservation, in like manner as if such conditions or powers had been reserved to him as incident to his part of the reversion in respect of the apportioned rent, or other reservation allotted or belonging to him.

(c) *Wright v. Burroughes*, 3 C. R. 685.

CHAPTER II.

BY ACT OF LAW.

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A CHANGE of parties may take place by act of law as well as by the act of the parties themselves. Thus the death of the lessor or lessee, the bankruptcy or marriage (in certain cases) of either, and execution under a process of law, will effect a change of parties. These will be considered in their order.

With respect to the abatement of actions already commenced, the mode of continuing actions upon the death, bankruptcy, marriage of one of the parties, or the transfer to him or her by operation of law of the cause of action, has been greatly simplified by the rules of the Judicature Act 1875 (a), but they only apply where the cause of action survives.

(a) By the Judicature Act, 1875, and form as hereinafter prescribed, and on such terms as the court or judge shall think just, and shall make such order for the disposal of the action as may be just." By rule 3, "In case of an assignment, creation, or devolution of any estate or title, *pendente lite*, the action may be continued by or against the person to, or upon whom such estate or title has come or devolved." By rule 4, "Where by reason of marriage, death, or bankruptcy, or any other event occurring after the commencement of an action, and causing a change or transmission of interest or liability, or by reason of any person interested coming into existence after the commencement of the action, it becomes necessary or desirable that any person not already a party to the action should

CHAP. II.

Of lessor.

I. DEATH.

If the reversion descends to the heir, he is affected by such covenants as run with the land (b), and may sue for breaches committed after the death of the lessor.

For breaches committed after the death of the ancestor, the heir may sue although he is not named, and the covenant is made with the ancestor, his "executors, and administrators" (c).

When the covenants run with the land and descend to the heir, he cannot sue for breaches which happened before the death of the ancestor, unless the substantial damage has taken place since the death (d).

So also the heir is liable to be sued, whether named or not (e). For breaches committed by the ancestor during

be made a party thereto, or that any person already a party thereto should be made a party thereto in another capacity, an order, that the proceeding in the action shall be carried on between the continuing parties to the action and such new party or parties, may be obtained *ex parte* on application to the court or a judge upon an allegation of such change or transmission of interest or liability, or of such person interested having come into existence." By rule 5, "An order so obtained shall, unless the court or judge shall otherwise direct, be served upon the continuing party or parties to the action or their solicitors, and also upon each such new party, unless the person making the application be himself the only new party, and the order shall from the time of such service, subject, nevertheless, to the two following rules, be binding on the persons served therewith, and every person served therewith, who is not already a party to the action, shall be bound to enter an appearance thereto within the same time and in the same manner as if he had been served with a writ of summons." By rule 6, "Where any person who is under no disability, or under no disability other than coverture, or being under any disability other than coverture, but

having a guardian *ad litem* in the action, shall be served with such order, such person may apply to the court or judge to discharge or vary such order at any time within twelve days from the service thereof." By rule 7, "Where any person being under any disability other than coverture, and not having had a guardian *ad litem* appointed in the action is served with any such order, such person may apply to the court or a judge to discharge or vary such order at any time within twelve days from the appointment of a guardian or guardians *ad litem* for such party, and until such period of twelve days shall have expired, such order shall have no force or effect as against such last-mentioned person."

(b) *Lougher v. Williams*, 2 Lev. 92; Com. Dig. Covenant, (B) 2. 3.

(c) *Lougher v. Williams*, 2 Lev. 92.

(d) Com. Dig. Administration, (B) 13, Covenant, (B); *Kingdon v. Nottle*, 1 M. & G. 335; *King v. Jones*, 5 Taunt. 418; *Orme v. Broughton*, 10 Bing. 533; *Raymond v. Fitch*, 2 Cr. M. & R. 588; *Ricketts v. Weaver*, 12 M. & W. 718.

(e) *Andrew's Case*, 2 Leo. n. 104; *Anon. Dyer*, 257 a.

life, he is, however, not answerable, unless named, and then only to the extent of the assets which he has by descent (*f*).

For breaches of covenant by the lessee, whether running with the land or not, which were made before the death of the lessor, the executors and administrators are the proper persons to sue (*g*).

If the reversion is a chattel, it passes to the executor or administrator, who is bound by and has the advantage of all the conditions and covenants (*h*).

The executor of the lessor may sue his lessee for a breach of covenant committed in the lifetime of the testator; and it is not necessary to aver any damage to the personal estate (*i*) unless it be a covenant upon which the heir alone can sue (*j*), or unless it be a mere personal contract (*k*).

Upon the death of the lessee, his personal representative Death of lessee. may be sued, in his representative capacity, for rent, or for breach of express covenant, to the amount of the assets (*l*); but he is not liable for breaches of implied covenants (*m*) broken after the death of the testator (*n*).

If, however, he be sued for rent as assignee, and the profits of the lease are less than the rent, and he has no other assets, he should plead that the premises are of less yearly value than the rent, that he has offered to surrender his lease to his landlord, and that he has no other assets (*o*), and should pay the actual value of the premises during the period into court (*p*).

He must not, however, have depreciated the value of the

(*f*) Co. Litt. 209 a; Anon. Dyer, 14 a; Giffard v. Young, 1 Lutw.; Dyke v. Sweeting, Willes, 585; Buckley v. Nightingale, 1 Str. 665; Derisley v. Custance, 4 T. R. 75.

(*g*) See *infra*.

(*h*) Co. Litt. 209 a; Com. Dig. tit. Covenant, (C) 1; Williams v. Burrell, 1 C. B. 402.

(*i*) Raymond v. Fitch, 2 Cr. M. & R. 588; Ricketts v. Weaver, 12 M. & W. 718.

(*j*) Kingdon v. Nottle, 1 M. & S. 355; King v. Jones, 5 Taunt. 418.

(*k*) Ricketts v. Weaver, *supra*.

(*l*) Tilney v. Norris, 1 Lord Raymond, 553; Williams on Executors, 1492; Wollaston v. Hakewill, 3 M. & Gr. 320; Kearsley v. Oxley, 2 H. & C. 896.

(*m*) See *ante*, Part 1, c. 4, s. 7 b, Implied Covenants.

(*n*) Adams v. Gibney, 6 Bing. 656; Penfold v. Abbot, 32 L. J. Q. B. 67.

(*o*) Rubery v. Steevens, 4 B. & Ad. 241; Hornidge v. Wilson, 11 Ad. & Ell. 645.

(*p*) Patten v. Reid, 6 L. T. N. S. 281, Q. B.

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rent by his own acts (*q*), and he will be liable for the profit and advantage which he might have received from the premises to the amount of the rent due (*r*).

But if he be sued as assignee for breach of any other covenant, the above plea will not avail him (*s*), and his only course seems to be to assign it over to some third party (*t*). See, however, the 22 & 23 Vict. c. 35, s. 27, *infra*.

He will not, however, be liable as assignee for future breaches of covenant when he has expended the amount of the sale of the lease, and all the other assets, in payment of simple contract debts (*u*).

The profits of the land are to be applied, in the first place, by the executor to the discharge of the rent. If the profits are insufficient, he must pay the rent out of the assets, and he will not be answerable beyond his assets if he plead as above (*v*).

Where a term is specifically bequeathed, it vests at first in the executor, and the legatee cannot enter until the assent of the executor is given (*w*). The executor cannot waive the term, although it be worth nothing, for he must renounce the executorship *in toto* or not at all (*x*).

Formerly executors could not be charged and could not recover in trespass for any personal wrong done by or to the testator, as for cutting down trees, &c.; but now, by the 3 & 4 Will. IV. c. 42, s. 2, they may be sued for such wrongs committed within six months before the death of the testator (*y*).

Personal representatives are now protected from claims after assignment by the 22 & 23 Vict. c. 35, s. 27, by which

- (*q*) *Hornidge v. Wilson*, *supra*.
 (*r*) *Hopwood v. Whaley*, 6 C. B. 744.
 (*s*) *Tremere v. Morison*, 1 Bing. N.C. 89; *Sleap v. Newman*, 12 O. B. N.S. 116; *Wollaston v. Hake-will*, 3 M. & Gr. 297.
 (*t*) *Taylor v. Shum*, 1 B. & P. 21; *Pitcher v. Tovey*, 4 Mod. 71; *Will-son v. Wigg*, 10 East. 313. See *ante*, Covenants which Run with the Land, p. 324.
 (*u*) *Collins v. Crouch*, 13 Q. B. 542; and it seems that he need not retain the profits of the land in order to provide for a future breach of covenant, unless it be for pay-ment of rent.
 (*v*) *Ante*, p. 266.
 (*w*) *Doe d. Maberly v. Maberly*, 6 C. & P. 126; *Wollaston v. Hake-will*, *supra*.
 (*x*) *Hellier v. Casbard*, 1 Sid. 266, 1 Lev. 127; *Rubery v. Stevens*, 4 B. & Ad. 244, 1 Wms. Exors. 642.
 (*y*) *Powell v. Rees*, 7 A. & E. 426. See *Erskine v. Adeane*, 42 L. J. Ch. 825.

it is enacted, that where an executor or administrator, liable as such to the rents, covenants, or agreements contained in any lease or agreement for a lease granted or assigned to the testator or intestate whose estate is being administered, shall have satisfied all such liabilities under the said lease or agreement for a lease as may have accrued due and been claimed up to the time of the assignment hereafter mentioned, and shall have set apart a sufficient fund to answer any future claim that may be made in respect of any fixed and ascertained sum covenanted or agreed by the lessee to be laid out on the property demised or agreed to be demised, although the period for laying out the same may not have arrived, and shall have assigned the lease, or agreement for a lease, to a purchaser thereof, he shall be at liberty to distribute the residuary personal estate of the deceased to and amongst the parties entitled thereto respectively, without appropriating any part or any further part (as the case may be) of the personal estate of the deceased to meet any future liability under the said lease or agreement for a lease; and the executor or administrator so distributing the residuary estate shall not, after having assigned the said lease or agreement for a lease, and having, where necessary, set apart such sufficient fund as aforesaid, be personally liable in respect of any subsequent claim under the said lease or agreement for a lease; but nothing herein contained shall prejudice the right of the lessor, or those claiming under him, to follow the assets of the deceased into the hands of the person or persons to or amongst whom the said assets may have been distributed.

A similar provision is contained in sect. 28, for the protection of personal representatives liable as such to the rents, covenants, or agreements contained in any conveyance of chief rent, or rent-charge, or agreement for such conveyance.

Leases made before the statute are within the above section (2).

2. BANKRUPTCY.

The Bankruptcy Act, 1869, 32 & 33 Vict. c. 71 (a), after Bankruptcy. providing that the property of the bankrupt shall become

(a) *Dodson v. Sammell*, 1 Drew & Sm. 575, 30 L. J. Ch. 799; *Smith v. Smith*, 1 Drew & Sm. 384. Judges sitting in Parliament), and 31 & 32 Vict. c. 104, are repealed except as to past transactions. See 32 & 33 Vict. c. 83, s. 20, and the schedule.
(a) The 12 & 13 Vict. c. 106, 24 & 25 Vict. c. 134, 25 & 26 Vict. c. 99 (except s. 4, as to County Court

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divisible amongst his creditors, and for the appointment of trustee by a general meeting of creditors who are to give directions as to the manner in which the property is to be administered by the trustee (b), enacts, by sect. 22, "that where any portion of such estate (the property of the bankrupt) consists of copyhold or customary property, or any like property, passing by surrender and admittance, or in any similar manner, the trustees shall not be compellable to be admitted to such property, but may deal with the same in the same manner as if such property had been capable of being, and had been, duly surrendered or otherwise conveyed to such uses as the trustee may appoint; and any appointee of the trustee shall be admitted or otherwise invested with the property accordingly."

"Where any portion of the property of the bankrupt consists of things in action, any action, suit, or other proceeding for the recovery of such things, instituted by the trustee, shall be instituted in his official name, as in this Act provided; and such things shall, for the purpose of such action, suit, or other proceeding, be deemed to be assignable in law, and to have been duly assigned to the trustee in his official capacity."

By sect. 23, "When any property of the bankrupt acquired by the trustee under this Act consists of land of any tenure burdened with onerous covenants, of unmarketable shares in companies, of unprofitable contracts, or of any other property that is unsaleable, or not readily saleable, by reason of its binding the possessor thereof to the performance of any onerous act, or to the payment of any sum of money, the trustee, notwithstanding he has endeavoured to sell, or has taken possession of such property, or exercised any act of ownership in relation thereto, may, by writing under his hand, disclaim such property, and upon the execution of such disclaimer the property disclaimed shall, if the same is a contract, be deemed to be determined from the date of the order of adjudication, and if the same is a lease, be deemed to have been surrendered on the same date (c), and if the

(b) Sects. 14, 20.

(c) A contract of tenancy is put an end to by the bankruptcy of the tenant or the liquidation of his affairs, and the remedy of the landlord is against the estate of the bankrupt. *Ex parte Llymvi Coal Co.*, L. R. 7 Ch. 28. No notice to

quit is required. In cases of composition the usual notice would be required to be given. The one year's notice under s. 51 of the Agr. Hold. Act, 1875, does not apply to bankruptcy or composition. See the Statute in Appendix.

same be shares in any company, be deemed to be forfeited from that date, and if any other species of property, it shall revert to the person entitled on the determination of the estate or interest of the bankrupt, but if there shall be no person in existence so entitled, then in no case shall any estate or interest therein remain in the bankrupt. Any person interested in any disclaimed property may apply to the Court, and the Court may, upon such application, order possession of the disclaimed property to be delivered up to him, or make such other order as to the possession thereof as may be just."

"Any person injured by the operation of this section shall be deemed a creditor of the bankrupt, to the extent of such injury, and may accordingly prove the same as a debt under the bankruptcy."

By sect. 24, "The trustee shall not be entitled to disclaim any property in pursuance of this Act in cases where an application in writing has been made to him by any person interested in such property, requiring such trustee to decide whether he will disclaim or not, and the trustee has for a period of not less than twenty-eight days after the receipt of such application, or such further time as may be allowed by the Court, declined or neglected to give notice whether he disclaims the same or not" (*d*).

If parties choose to conduct their affairs at common law, instead of taking the protection of this statute, they do it at their own risk, and cannot obtain any assistance from the statute, the provisions of which they have elected to disregard. Therefore if a man, whether as an assignee for creditors, or in his own right, takes an assignment of a lease, it becomes his by virtue of that assignment without any further act of acceptance (*e*).

A point of a somewhat similar nature arose in several cases in Chancery, where the distinctions between cases of liquidation in bankruptcy, of composition by arrangement, and of ordinary bankruptcy, were pointed out (*f*).

(*d*) As to time of disclaimer see 32; *Williams v. Bosanquet*, 1 B. & Ex parte Lowering, L. R. 9 Ch. 586; *B. 238*.
Barmer v. Johnson, L. R. 2 Ch. D. 802; *Ex parte Moore*, L. R. 2 Ch. D. 802; *Ex parte Davis*, L. R. 3 Ch. D. 463.

(*e*) *White v. Hunt*, L. R. 6 Ex. 463.
 (*f*) *Ex parte Veness, in re Gwynn*, L. R. 10 Eq. 419; *Ex parte Todhunter, in re Norton*, ib. 425; *Ex parte Key, in re Skinner*, ib. 433; *Birmingham Gas Light Company, in re Adams*, L. R. 11 Eq. 204.

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When a trustee disclaims, he will not be able to enforce a covenant by the landlord to purchase any buildings, fixtures, or improvements at the end of the term (*g*).

A lessee assigned the unexpired residue of his term to one who became bankrupt, and whose trustee disclaimed. An action was brought against the original lessee by his lessor for rent due between the adjudication and the disclaimer, and it was held that the action lay; and *semble* (*h*) it would also lie for rent due after the disclaimer, the Court having made no order as to the possession of the property disclaimed (*i*).

A lessor who grants a lease subject to a certain rent, and to certain conditions, is not by reason of the bankruptcy of his lessee, and the disclaimer of the trustee, compelled to take to an underlease at a less rent, and subject to other conditions (*j*).

By sect. 25 it is enacted that, subject to the provisions of this Act, the trustee shall have power to do the following things:—

1. To receive and decide upon proof of debts in the prescribed manner, and for such purpose to administer oaths.

2. To carry on the business of the bankrupt so far as may be necessary for the beneficial winding up of the same.

3. To bring or defend any action, suit, or other legal proceeding relating to the property of the bankrupt.

4. To deal with any property to which the bankrupt is beneficially entitled as tenant in tail, in the same manner as the bankrupt might have dealt with the same; and sects. 56 to 73 (both inclusive) of the Act of the session of the third and fourth years of the reign of King William IV. (chap. 74), for “the abolition of fines and recoveries, and for the substitution of more simple modes of assurance,” shall extend and apply to proceedings in bankruptcy under this Act, as if those sections were here re-enacted and made applicable in terms to such proceedings.

5. To exercise any powers the capacity to exercise which is vested in him under this Act, and to execute all powers of attorney, deeds, and other instruments, expedient or necessary

(*g*) *Kearney v. Carstairs*, 2 B. & Ad. 716.

(*h*) *Per Martin & Figgot*, B.B., *Bramwell B. diss.*

(*i*) *Smyth v. North*, L. R. 7 Ex. 242.

(*j*) *Taylor v. Gillott*, L. R. 20 Eq. 682; 44 L. J. Ch. 740. This was a bill to restrain an ejectment and to compel the lessor to grant a lease in accordance with the terms of an underlease.

for the purpose of carrying into effect the provisions of this Act.

6. To sell all the property of the bankrupt (including the goodwill of the business, if any, and the book-debts due, or growing due to the bankrupt), by public auction or private contract; with power, if he thinks fit, to transfer the whole thereof to any person or company, or to sell the same in parcels.

7. To give receipts for any money received by him, which receipt shall effectually discharge the person paying such moneys from all responsibility in respect of the application thereof.

8. To prove, rank, claim, and draw a dividend in the matter of the bankruptcy or sequestration of any debtor of the bankrupt.

By sect. 26, the trustee has power to appoint the bankrupt to superintend the management of the property for the benefit of the creditors.

By sect. 27, the trustee may, with the sanction of the committee of inspection, amongst other things, mortgage or pledge any part of the property of the bankrupt for the purpose of raising money for the payment of his debts.

The trustee in bankruptcy may assign the bankrupt's lease without the landlord's license, notwithstanding the lessee's covenant not to assign without license (*k*); and where the bankrupt had assigned for the benefit of his creditors, yet the forfeiture was void against the assignee in bankruptcy (*l*).

Trust property remains vested in the bankrupt (*m*); but by the 117th section, where the bankrupt is a trustee within the "Trustee Act, 1850" (*n*), the Court may appoint a new trustee.

Where the bankrupt has any beneficial interest, as, for example, in right of his wife, it passes to the trustee in bankruptcy (*o*).

(*k*) *Doe d. Goodbehere v. Bevan*, 3 M. & S. 353; *Doe d. Cheere v. Smith*, 5 Taunt. 795.
(*l*) *Doe d. Lloyd v. Powell*, 5 B. & C. 308.
(*m*) 32 & 33 Vict. c. 71, s. 15. pl. 1; *Dangerfield v. Thomas*, 9 A. & E. 292; *Houghton v. Koenig*, 18 C. B. 235.
(*n*) 13 & 14 Vict. c. 60.
(*o*) *Michel v. Hughes*, 6 Bing. 689; *Doe d. Shaw v. Steward*. So also a mere equity of redemption passes; *Vandenanker v. Desborough*, 2 Vern. 96.

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Machinery and fixtures attached to the freehold are part of the freehold during the term, and on the bankruptcy of the tenant do not pass to the trustee (*p*).

By sect. 34, the landlord or other person to whom any rent is due from the bankrupt may at any time, either before or after the commencement of the bankruptcy, distrain upon the goods or effects of the bankrupt for the rent due to him from the bankrupt, with this limitation, that if such distress for rent be levied after the commencement of the bankruptcy, it shall be available only for one year's rent, accrued due prior to the date of the order of adjudication; but the landlord or other person to whom the rent may be due from the bankrupt may prove under the bankruptcy for the overplus due for which the distress may not have been available.

By sect. 35, when any rent or other payment falls due at stated periods, and the order of adjudication is made at any time other than one of such periods, the person entitled to such rent or payment may prove for a proportionate part thereof up to the day of the adjudication, as if such rent or payment grew due from day to day.

A landlord cannot enforce payment in full by the trustee of rent due before the bankruptcy, except by a distress for the arrears not exceeding one year's rent (*q*). He may distrain for all subsequent rent (*r*). And it makes no difference that the rent is payable in advance (*s*).

A lease may contain a proviso for re-entry upon the bankruptcy of the lessee, his executors, administrators, or assigns (*t*), or be limited so as to cease upon the bankruptcy of the lessee (*u*), and the landlord may enter accordingly (*v*).

(*p*) *Boydell v. M'Michael*, 1 C. M. & R. 177; *Ex parte Reynall*, 2 M. D. & D. 443; *Walmaley v. Milne*, 7 C. B. N.S. 115, 29 L. J. C. P. 97.

(*q*) *Gethin v. Wilkes*, 2 Dowl. 189.

(*r*) *Briggs v. Sowry*, 8 M. & W. 729; *Newton v. Scott*, 9 M. & W. 431, 10 Id. 471.

(*s*) *Ex parte Hale*, 45 L. J. Bank, 21. A distress for rent cannot be restrained as being an execution or "other legal process" within sect. 13. *Ex parte Birmingham Gas Co.*, 40 L. J. Bank, 52. When a receiver

of the Court of Chancery was in possession, it was the duty of the landlord to apply to the Court before distraining. *Re Sutton*, 32 L. J. Ch. 437; but where a receiver of the Court of Bankruptcy had possession, it was held that the landlord could distrain without leave of the Court. *Ex parte Till*, 42 L. J. Bank, 84; L. R. 16 Eq. 97.

(*t*) *Roe d. Hunter v. Galliers*, 2 T. R. 133.

(*u*) *Doe d. Lockwood v. Clarke*, 8 East. 185.

(*v*) *Doe d. Bridgman v. David*, 1 C. M. & R. 405.

By the Companies Act, 1862, s. 87 (*w*), "When an order has been made for winding up a company under this Act, no suit, action, or other proceeding shall be proceeded with, or commenced against the company, except with the leave of the Court, and subject to such terms as the Court may impose." And by sect. 163, "Where any company is being wound up by the Court, or subject to the supervision of the Court, any attachment, sequestration, distress, or execution put in force against the estate or effects of the Company, after the commencement of the winding up, shall be void to all intents."

Where an execution has been perfected by seizure before the commencement of the winding up, a sale after the commencement is not a "putting in force of the execution within sect. 163" (*x*). But where a landlord, after an order for the winding up of a company, distrained for the rent of the offices due prior to the winding up, it was held that the distress was void (*y*).

3. MARRIAGE.

A change is also effected in the relations of the parties to marriage by a lease by the marriage of a female lessor or lessee.

The relations of husband and wife have been in some respect altered by the "Married Woman's Property Act, 1870" (*z*).

(*w*) 25 & 26 Vict. c. 89.

(*x*) *Ex parte* Parry, in *re* The Great Ship Co., 33 L. J. Ch. 245.

(*y*) *In re* The Progress Assurance Co., *ex parte* The Liverpool Exchange Co., 39 L. J. Ch. 504, L. R. 9 Eq. 370. See also *In re* The London Cotton Co., 35 L. J. Ch. 425, L. R. 2 Eq. 53; *In re* Bastow & Co., 36 L. J. Ch. 899; L. R. 4 Eq. 618; *In re* The Exhall Coal Mining Co., 33 L. J. Ch. 595. And this is so now notwithstanding sect. 10 of the Jud. Act, 1875, which does not in this matter assimilate the practice in winding-up to that in Bankruptcy. *In re* Coal Consumer's Association, L. R. 4 Ch. D. 625.

(*z*) 33 & 34 Vict. c. 93. The different species of property affected by that Act are apparently:—Sect. 1, (1) Wages or earnings acquired (after the Act) in any employment, occupation, or trade. (2) Money or

property acquired (after the Act) by literary, artistic, or scientific skill. (3) All investments of the above.

Sect. 7, (4) Any personal property to which a woman married after the Act becomes entitled during marriage as next of kin to an intestate. (5) Any sum of money, not exceeding £200, to which a woman married after the Act becomes entitled during marriage under any deed or will.

Sect. 8, (6) Freehold, copyhold, or customary-hold property, which descends upon any woman married after the Act, as heiress of an intestate, as far as regards the rents and profits thereof.

The sections which seem most material to the present subject are as follows:—

By sect. 1, it is enacted, that the wages and earnings of any married

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Of female lessor.

In the case of the female lessor, upon her marriage, her husband takes, during coverture, a freehold interest in her freeholds of inheritance (unless they be settled upon her with his consent at her marriage), and he may dispose of them by deed for their joint-lives, without her concurrence (a).

woman acquired or gained by her after the passing of this Act (9th of August, 1870, see s. 15), in any employment, occupation, or trade, in which she is engaged, or which she carries on separately from her husband, and also any money or property so acquired by her through the exercise of any literary, artistic, or scientific skill, and all investments of such wages, earnings, money, or property, shall be deemed and taken to be property held and settled to her separate use, independent of any husband to whom she may be married, and her receipts alone shall be a good discharge for such wages, earnings, money, and property.

By sect. 7, where any woman married after the passing of this Act shall, during her marriage, become entitled to any personal property as next of kin, or one of the next of kin of an intestate, or to any sum of money not exceeding £200, under any deed or will, such property shall, subject and without prejudice to the trusts of any settlement affecting the same, belong to the woman for her separate use, and her receipts alone shall be a good discharge for the same.

By sect. 8, where any freehold, copyhold, or customary-hold property shall descend upon any woman, married after the passing of this Act, as heiress or co-heiress of an intestate, the rents and profits of such property shall, subject and without prejudice to the trusts of any settlement affecting the same, belong to such woman for her separate use, and her receipts alone shall be a good discharge for the same.

By sect. 11, a married woman may maintain an action in her own name for the recovery of any wages, earnings, money, and property by this Act declared to be her separate property, or of any property belonging to her before marriage, and which her husband shall, by writing under his hand, have agreed with her shall belong to her after marriage as her separate property; and she shall

have, in her own name, the same remedies, both civil and criminal, against all persons whomsoever, for the protection and security of such wages, earnings, money, and property, and of any chattels or other property purchased or obtained by means thereof for her own use, as if such wages, earnings, money, chattels, and property belonged to her as an unmarried woman; and in an indictment or other proceeding it shall be sufficient to allege such wages, earnings, money, chattels, and property to be her property.

By sect. 12, a husband shall not, by reason of any marriage which shall take place after this Act has come into operation, be liable for the debts of his wife contracted before marriage (this is repealed with respect to marriages taking place after 30th July 1874; 37 & 38 Vict. c. 50, s. 1, and he is now liable to the extent of his assets, see sect. 2); but the wife shall be liable to be sued for, and any property belonging to her for her separate use shall be liable to satisfy such debts, as if she had continued unmarried. (Husband and wife married after the 30th July 1874, may be jointly sued for these debts, 37 & 38 Vict. c. 50, s. 1).

By sect. 39 of the Agricultural Holdings Act (see the statute in appendix), the County Court may appoint a person to act as next friend of a married woman, and she, if entitled for her separate use, and without restraint, is to be in respect of land as if she were unmarried, and if her husband's consent is required, provision is made for her examination.

(a) Co. Litt. 351 a; Bac. Abr. tit. Baron and Feme, (C) 1; Robertson v. Norris, 11 Q. B. 916. He can also make leases for twenty-one years. See the 19 & 20 Vict. c. 120; and she can convey her estate by deed acknowledged under the 3 & 4 Will. IV. c. 74, with the husband's concurrence. See Jolly v. Hancock, 7 Exch. 820.

When issue is born, the husband becomes tenant for life by the courtesy of her freeholds and estates tail in possession (*b*).

If there be no issue, then, on the death of the wife, the husband's interest ceases, and he cannot sue for rent accruing due subsequently (*c*).

If, however, the letting were by the husband alone, he could sue, and the tenant would be estopped from denying his title (*d*).

Upon covenants running with the wife's land or reversion, the husband may either sue alone or jointly with his wife, if the breaches are subsequent to the coverture (*e*), except for breaches of covenants for title and further assurance (*f*).

Arrears of rent, breaches of covenant, &c., before marriage, are *choses in action*, which must be sued for jointly (*g*).

If the husband die without reducing into possession the wife's choses in action, they survive to her (*h*).

See, as to contracts, this subject fully treated of in "Addison on Contracts," 6th edit, 751.

By the 15 & 16 Vict. c. 76, s. 40, counts and claims in actions by husband and wife may be joined, and separate actions consolidated (*i*).

By sect. 141, marriage of the female plaintiff or defendant will not abate an action (*j*).

(*b*) Co. Litt. 29 a, 30 B; Doe *d. Neville v. Rivers*, 7 T. R. 276, 278.

(*c*) Hill *v. Saunders*, 4 B. & C. 529; Howe *v. Scarrott*, 4 H. & N. 723, 28 L. J. Exch. 325.

(*d*) See *per Martin, B.*, in Howe *v. Scarrott*, *supra*; Wallace *v. Harrison*, 5 M. & W. 142; North *v. Wyard*, 2 Bulst. 233; Harcourt *v. Wyman*, 3 Exch. 824; Parry *v. Hindle*, 2 Taunt. 180.

(*e*) Alebury *v. Walby*, 1 Str. 229; Dunstan *v. Berwell*, 1 Wils. 224; Howell *v. Maine*, 3 Lev. 403; Bret *v. Cumberland*, Cro. Jac. 599.

(*f*) Middlemore *v. Goodall*, 1 Roll. Abr. 348.

(*g*) Hardy *v. Robinson*, 1 Keb. 89; Milner *v. Milnes*, 3 T. R. 631; Caudell *v. Shaw*, 4 T. R. 361. So where the husband becomes bank-

rupt, the assignees must join; Sherrington *v. Yates*, 12 M. & W. 855.

(*h*) Richards *v. Richards*, 2 B. & Add. 447; Gaters *v. Madeley*, 6 M. & W. 423; Scarpelini *v. Atcheson*, 7 Q. B. 864.

(*i*) See Stowe *v. Jackson*, 16 C. B. 199; Morris *v. Moore*, 19 C. B. N.S. 359; Hemstead *v. Phoenix Gas Co.*, 3 H. & C. 745.

(*j*) Wynne *v. Wynne*, 2 M. & Gr. 8, and see *ante*, p. 265, note a. By Order XVI. rule 8, of the Jud. Act, 1875, married women may sue by their next friends, and may sue or defend alone by leave and upon giving security for costs. By Order XVII. rule 4, claims by or against husband and wife may be joined with claims by or against either of them separately.

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A female lessor who has made a lease at will does not void the lease by marriage, nor can she avoid it without the consent of her husband (*k*).

The wife's acceptance of rent will confirm leases for years by deed made by her husband, or by herself and husband; and her issue or heir will have the same power to confirm or avoid them (*l*).

Of female lessee. In the case of a female lessee, marriage gives to the husband all the wife's chattels not put into settlement (*m*), and he may dispose of them without her concurrence. If he demise for part of a term of years, the rent will go to his executor or administrator, though the wife survive, or if he make a lease to commence after his death. But if the husband does not dispose of a chattel real of his wife, if she survive she shall have it (*n*).

So a part of a term undisposed of survives to the wife (*o*).

When lands are demised to husband and wife, and the husband grants an underlease, he may sue for an injury to the reversion, without joining his wife as a party to the suit (*p*).

A husband cannot assign his wife's reversionary interest in leaseholds, if that interest could not have vested in the wife during coverture (*q*).

A joint-tenancy may exist between a married woman and another, until the husband breaks it by disposing of the wife's moiety; and if he die without disposing of it, the joint-tenancy will continue; and if the wife die, the surviving joint-tenant, and not the husband, shall take the whole (*r*).

A female lessee at will does not avoid the lease by marriage,

(*k*) Bac. Abr. tit. Baron & Feme, (C) 2. T.; Com. Dig. tit. Baron and (E); tit. Leases, (C). Feme, (E) 2.

(*l*) Bac. Abr. tit. Leases, (C).

(*m*) The husband can dispose of a wife's chattels settled on her without his concurrence. *Turner's case*, 1 Vern. 7; *Factor v. Semayne*, 2 Vern. 270; *Bates v. Dandy*, 2 Atk. 207.

(*n*) Bac. Abr. tit. Baron & Feme,

(*o*) Sym's case, Cro. Eliz. 33.

(*p*) Wallis v. Harrison, 5 M. & W. 142.

(*q*) Day v. Duberley, 16 Beav. 33, 5 H. L. Cas. 388.

(*r*) Co. Litt. 185 b; Com. Dig. tit. Baron & Feme, (E) 2; Bac. Abr. tit. Baron & Feme, (C) 2.

and she cannot avoid it subsequently without the consent of her husband (s).

The husband is not liable in an action for use and occupation by his wife before marriage, unless such occupation was at his special instance and request (t).

If the husband and wife be evicted of a term which he has in right of his wife, and if he recover it in his own name, this vests the term in the husband (u).

By the 6 Anne, c. 18, s. 35, every husband seised in right of his wife only, who, after the determination of the estate or interest shall hold over, shall be adjudged a trespasser, and the persons entitled to the premises may recover in damages the full value of the profits received during the wrongful possession (v).

4. BY WRITS OF EXECUTION.

Lastly, it remains to be considered what is the effect produced upon the relations in which the parties stand to one another by the operation of a writ of *feri facias* or of *elegit* (w). By writs of execution.

It is the duty of the sheriff upon seizure and sale under a writ of *feri facias*, to assign the term by deed, and until he does so the term remains in the debtor, who may bring an action for the recovery of land against the person to whom possession has been given (x).

The purchaser is generally left to obtain possession by action, or to recover his rent by distress or action (y).

He is liable for the rent, and upon covenants contained in the lease (z); but the lessee continues liable, notwithstanding the estate is taken from him against his consent (a).

(s) Bac. Abr. tit. Baron and Feme, (E).

(t) Richardson v. Hall, 1 Br. & B. 50.

(u) Bac. Abr. tit. Baron and Feme, (C) 2.

(v) See also Caton v. Coles, L. R. 1 Eq. 581.

(w) These writs are kept in force by the Jud. Act, 1875, Order XLIII.

(x) Doe d. Hughes v. Jones, 9 M. & W. 372; Playfair v. Musgrove, 14 M. & W. 239.

(y) Lloyd v. Davies, 2 Ex. 103; Mayor of Poole v. Whitt, 15 M. & W. 571.

(z) 1 Doug. 184.

(a) Auriol v. Mills, 4 T. R. 99.

CHAP. II.

An equitable reversionary interest in a term cannot be seized and sold under a *fiery facias* or *elegit* (b).

By the 1 & 2 Vict. c. 110, s. 11, it is enacted, that it shall be lawful for the sheriff, or other officer to whom any writ of *elegit*, or any precept in pursuance thereof, shall be directed, at the suit of any person upon any judgment which, at the time appointed for the commencement of this Act, shall have been recovered, or shall be thereafter recovered, in any action in any of Her Majesty's superior Courts at Westminster, to make and deliver execution unto the party in that behalf suing, of all such lands, tenements, rectories, tithes, rents, and hereditaments, including lands and hereditaments of copyhold or customary tenure, as the person against whom execution is so sued, or any person in trust for him, shall have been seised or possessed of at the time of entering up the said judgment or at any time afterwards, or over which such persons shall at the time of entering up such judgment, or at any time afterwards, have any disposing power which he might, without the assent of any other person, exercise for his own benefit, in like manner as the sheriff or other officer may now make and deliver execution of one moiety of the lands and tenements of any person against whom a writ of *elegit* is sued out; which lands, tenements, rectories, tithes, rents, and hereditaments, by force and virtue of such execution, shall accordingly be held and enjoyed by the party to whom such execution shall be so made and delivered, subject to such account in the Court out of which such execution shall have been sued out as a tenant by *elegit* is now subject to in a court of equity: provided always, that such party suing out execution, and to whom any copyhold or customary lands shall be so delivered in execution shall be liable, and is hereby required to make, perform, and render to the lord of the manor, or other person entitled, all such and the like payments and services as the person against whom such execution shall be issued would have been bound to make, perform, and render in case such execution had not issued; and that the party so suing out such execution, and to whom any such copyhold or customary lands shall have been so delivered in execution, shall be entitled to hold the same until the amount of such payments, and the value of

(b) *Scott v. Scholey*, 8 East. 467; *Metcalfe v. Scholey*, 2 B. & P. N. R. 461; *Mayor of Poole v. Whitt*, 15 M. & W. 571. It seems it may be by equity where the creditor has sued out an *elegit* without effect. See *Gore v. Bowser*, 3 Sm. & Giff 1; *Partridge v. Foster*, 34 Beav. 1; *Godfrey v. Tucker*, 33 L. J. Ch. 559. See, however, *Thornton v. Finch*, 4 Giff. 505, 34 L. J. Ch. 466.

such services, as well as the amount of the judgment, shall have been levied: provided also, that, as against purchasers, mortgagees, or creditors, who shall have become such before the time appointed for the commencement of this Act, such writ of *elegit* shall have no greater or other effect than a writ of *elegit* would have had in case the Act had not passed.

After the execution of an inquisition by the jury, the sheriff returns the finding of the jury, and that he has caused the lands "to be delivered to [the execution creditor], by a reasonable price and extent, to hold, to him and his assigns, according to the nature and tenure thereof, according to the form of the statutes in such case made and provided, until the [debt and damages] in the writ mentioned, together with interest upon the same, as therein mentioned, shall have been levied, as by the said writ is commanded" (c).

This return when filed operates as an assignment of the reversion (d).

The sheriff may deliver possession where the debtor is himself the occupier (e); but the tenants cannot be turned out of possession until the expiration of their terms (f).

But the tenant by *elegit* may sue or distrain for rent accrued after the return of the writ (g), but not before (h).

For the law relating generally to writs of *fi. fa.* and *elegit*, see Chit. Arch. Practice of Q. B. vol. i., 634-670 (i).

- (c) Chit. Forms, 342, 11th edit. S. 565; Arnold v. Ridge, 13 C. B. 745.
 (d) Lowthall v. Tomkins, 2 Eq. Cas. Abr. 380; Taylor v. Cole, 3 T. R. 295; Doe d. Da Costa v. Wharton, 8 T. R. 2.
 (e) Rogers v. Pitcher, 6 Taunt. 206; Chatfield v. Parker, 8 B. & C. 543.
 (f) Taylor v. Cole, *supra*; Doe d. Da Costa v. Wharton, *supra*.
 (g) Lloyd v. Davies, 2 Ex. 103; Ramsbottom v. Buckhurst, 2 M. & W. 379.
 (h) Sharp v. Key, 8 M. & W. 379.
 (i) As to "writs of execution" in which term writs of *fi. fa.* and *elegit* are included, see Jud. Act, 1875, Order XLII., 1-24; and for forms of these writs, see 1st Sched. App. F. 1, 2. As to abatement of actions upon an assignment by operation of law, see *ante*, p. 265, note a.

APPENDIX OF FORMS.

CHAPTER I.

FORMS OF AGREEMENTS AND LEASES, ETC.

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1. *An Agreement to let a House and Garden for twenty-one years, determinable at the option of either Landlord or Tenant at the end of the first, seven, or fourteen years.*

An agreement made the day of 18 , between Parties. AB of , hereinafter called "the landlord" of the one part, and CD of , hereinafter called "the tenant" of the other part, whereby it is mutually agreed as follows :—

The landlord will by deed, when required by the tenant, grant, and the tenant will, without investigating the landlord's title, accept a lease of all that messuage or dwelling-house situate at , in the county of , with the garden and paddock adjoining thereto, as the same is delineated in the plan annexed hereto, for a term of twenty-one years, determinable nevertheless, as hereinafter mentioned, from the day of 18 , at a yearly rent of £ , to be paid by equal quarterly payments on the day of , the day of , the day of , and the day of in each year, the first quarterly payment to be made on the day of 18 , and the last quarterly payment to be made one calendar month in advance before the expiration of the said term.

Landlord to grant and tenant to accept a lease. Parcels.

21 years.

CHAP. I.

Lease to contain certain covenants and provisions by tenant.
To pay rent.
Tithes and taxes.

To keep in repair.

To paint.

To keep garden in good order.

To permit landlord to enter and give notice of want of repair.

To insure.

To use as private house.
Not to assign without license.
To deliver up the premises.
Proviso for re-entry.

The lease shall contain the following covenants and provisions (that is to say), covenants by the lessee to pay the rent on the day at the times and in the manner hereinbefore mentioned, and to pay all the tithes or rentcharges in lieu of tithe and land-tax, and all taxes (a), charges, and assessments, whether parliamentary, parochial, municipal, or otherwise, then charged or thereafter to be charged on the said premises. To keep the said house, and all gates, stiles, fixtures, fences, wells, and drains, in good and substantial repair (b) and condition. To paint with two coats of good oil-colour, and in a workman-like manner, in every third year of the said term all the outside wood, iron, and other work previously or usually painted, and in every seventh year of the said term, all the inside wood, iron, and other work previously or usually painted. To keep the said garden and pleasure grounds, belonging to the said mansion-house, well stocked, cropped, and manured, and in proper order and condition, and in all respects to properly cultivate and manage the same. To permit the landlord, and all persons authorised by him, to enter on the said premises and view the condition thereof, and to give or leave notice in writing of all defects and want of repair, and, within three calendar months after every such notice, to repair and make good all defects and wants of repair whereof notice shall have been given or left. To keep (c) the said mansion-house and buildings insured against loss or damage by fire in some insurance office to be approved by the landlord, and to produce the policy and the receipts for the premium payable in respect of such policy, and in the event of fire to lay out the moneys to be received on every such policy in rebuilding, reinstating, replacing, or repairing the premises, or such part thereof as shall have been destroyed or damaged by fire, and, at his own costs, to make good any deficiency. To use the mansion-house and hereditaments as a private house only, and not to assign the premises without the license of the landlord. And at the expiration or sooner determination of the term to deliver up the premises, with all fixtures therein, whether placed by the tenant or not, in good repair and condition. And also a proviso for re-entry (d) in case the rent shall be unpaid for twenty-eight days, whether legally demanded or not, or in case of the breach, non-observance, or non-performance of any of the covenants and conditions to be contained in the lease. And a power (e) for either the landlord or

(a) As to payment of taxes, see *supra*, p. 80.

(b) As to repairs, see *supra*, p. 82,

175.
(c) As to insurance, see *supra*, p. 85.

(d) As to re-entry, see *supra*, p. 105.

(e) As to option to determine, see *supra*, p. 72.

tenant, on giving six calendar months' previous notice in writing to the other, to determine the lease at the end of the first, seven, or fourteen years of the term. And also the usual covenant by the landlord for quiet enjoyment (f).

CHAP. I.
Power to determine lease at the end of seven or fourteen years.
Quiet enjoyment.

The lease shall be prepared by the landlord, and the tenant shall execute and deliver to the landlord a counterpart thereof. The tenant shall pay all the expenses incurred in the preparation and execution of the said lease and counterpart, and of this present agreement (g).

These presents are intended to operate as an agreement only, and not to give the tenant any estate or interest in the premises (h). In witness, &c.

2. *An Agreement for the Lease of a House, Furniture, &c., from year to year (i).*

An agreement made this day of 18 , between Parties. AB, hereinafter called "the landlord" of the one part, and CD, hereinafter called "the tenant" of the other part, whereby the landlord agrees to let, and the tenant agrees to take, the house known as No. Street, Kensington, London, with the stables adjoining thereto, and all the furniture, fixtures, and effects described in the schedule hereto, for the term of one year (j) from the day of 18 , and so on from year to year until the tenancy shall be determined at the end of the first or any subsequent year, by either the landlord or tenant giving to the other six calendar months' previous notice in writing.

Landlord to let, tenant to take, house for one year, and so on from year to year.

The rent to be £ , and to be payable quarterly on the day of , the day of , the day of , and the day of , in each year. The first quarterly payment thereof to be made on the day of 18 , and the last quarterly payment thereof to be made one month before the determination of the tenancy. The tenant to pay all rates, taxes, and impositions, whether parliamentary, parochial, municipal, or otherwise, except land-tax and tithes or rentcharge in lieu thereof, which will be paid by the landlord.

Rent to be paid quarterly.

Tenant to pay all taxes, &c.

f) As to quiet enjoyment, see furnished house is a man of good means, as in the event of the tenant not paying the rent, the landlord would practically have no remedy. The furniture being the landlord's he could not well distrain.

supra, p. 102, 187.
(g) As to counterparts, see ante, p. 120.

(h) See ante, p. 42.

(i) Care should be taken to ascertain that an intending tenant of a (j) Or years if so required.

CHAP. I.

The tenant will leave the premises, and also the furniture, fixtures, and effects, in as good a state of repair and condition as the same are now in, reasonable wear and tear only excepted. As witness, &c.

(Here set out the schedule above alluded to.)

3. *An Agreement to let a piece of Land to a Builder.*

Parties.	An agreement made this day of 18 , between AB, hereinafter called "the landlord" of the one part, and CD, hereinafter called "the tenant" of the other part; whereby it is mutually agreed as follows:—
Parcels.	The landlord hereby agrees to let, and the tenant hereby agrees to take, the piece or parcel of land situate at , in the parish of , containing a. r. p., as the same is delineated in the plan drawn on the back (k) of the sheet of these presents, and therein coloured , for a term of 99 years,
Rent.	from the day of 18 , at the rents, and upon the conditions following—(that is to say), at the rent of one pepper-corn for the first year of the said term, at the rent of £ for the second year of the said term, and at the rent of £ for the third, and every subsequent year of the said term, the said yearly rents of £ and £ to be paid by equal quarterly payments on the day of , the day of , the day of , and the day of in each year, the first quarterly payment of the said rent of £ to be made on the day of 18 , and the first quarterly payment of the said rent of £ to be made on the day of 18 , and the last quarterly payment of the said rent of £ to be made on the day of 18 (l).
Tenant to make road.	The tenant will, to the satisfaction of the surveyor of the landlord, make and completely finish, before the day of 18 , a road as shown on the said plan and therein coloured , with proper footpaths, kerbs, gutters, drains, and gratings, and also will, to the satisfaction of the said surveyor, build and construct under the said road so to be made, all proper and necessary main sewers and drains, and such other sewers and drains, and connections with other sewers and drains, as may be required by the surveyor of the landlord, or by the local board, or other sanitary authority. And will keep the said road, main sewers and drains, in good repair and condition, until the same shall have been taken over by the parish, local board, or other sanitary authority. And will build upon the piece of land coloured on the said plan, houses of such eleva-
Sewers, &c.	
Keep the same in repair.	
Build houses.	

(k) Or "on the margin."

(l) One calendar month before the expiration of the lease.

CHAP. I.

tion and form, and in such building line as shall be approved by the surveyor of the landlord, each house to be of the value of £ , and to be constructed of the best materials, and in a good, sufficient, and workman-like manner, and will lay down drains with proper traps and gullies, connecting each house with the main sewers or drains to be made as aforesaid.

And will permit the surveyor of the landlord to enter upon the said hereditaments, to examine the materials used, or about to be used, in the construction of the houses, and also the houses then built or being built, and will instantly remove from the hereditaments any materials which may be disapproved of by the said surveyor, and will not use them in the construction of the said houses.

Permit landlord to enter.

And will, on or before the day of 18 , completely finish and render fit for habitation the said houses so to be built. And will lay out and plant the said piece of land coloured

Finish houses by a given day.

Lay out garden.

on the said plan, and marked with the word "garden," as an ornamental garden, with a lawn, shrubberies, trees, and flowers.

And will erect around the said garden an iron railing in a stone setting, with gates convenient to the occupiers of the houses about to be built, the arrangement and planting of the said garden and the form of the iron railings to be approved by the surveyor of the landlord.

Put up railing.

And will provide keys to the said gates, and will deliver one key to the occupier of each house. And will permit the occupiers of the said houses, their families, servants, and friends, to walk in and use the said garden, and will not permit any other person or persons to use the said garden. And will keep the said garden in good order and well planted and cultivated, and will paint the said iron railings once in every year, and renew the same with the stone setting whenever it shall be necessary.

Provide keys.

Permit occupiers to use garden.

Keep the garden in good order.

When the said road, main sewers, drains, and garden shall be finished to the satisfaction of the said surveyor, and when the said surveyor shall certify in writing to the landlord, his heirs or assigns, that any one or more of the said houses has been built, covered in, and completed to his satisfaction, then the landlord, his heirs or assigns, will grant to the tenant or his nominee, for the then residue of the said term of 99 years, a lease of any one house, or of two or more houses, the completion of which shall have been certified by the surveyor (m).

Landlord to grant lease.

A proportionate part of the entire rent payable in respect of the whole hereditaments shall be reserved in each lease, but the remainder of the entire rent shall continue to be payable by the tenant.

Rent.

(m) As to granting a lease, see *ante*, p. 189.

<p>CHAP. I.</p> <p>Covenants in lease.</p> <p>To pay rent.</p> <p>Taxes.</p> <p>To keep in repair.</p> <p>Paint.</p> <p>Insure.</p>	<p>Every lease shall contain the following covenants by the tenant :—To pay the rent reserved by the lease, and all the rates and taxes, whether parliamentary, parochial, municipal, or otherwise, imposed in respect of the premises comprised in the lease. To keep the premises in good repair and condition. And to paint in every third year of the term, the outside and in every seventh year of the said term, the inside of the said house or houses demised by the lease. To insure the said house or houses, and to keep the same insured in some office to be previously approved of in writing by the landlord, his heirs or assigns, and, when required by the landlord, his heirs or assigns, or their or his agent, to produce the rents for the premiums payable in respect of such insurance. If the premises are damaged or destroyed by fire, to apply the moneys received in respect of such insurance in or towards the rebuilding and repairing of the premises, and if the money received from such insurance shall be insufficient, then, at his own cost, to rebuild and repair the premises. And to permit the landlord, his heirs and assigns, and his or their agent, to enter upon the premises to view the state thereof, to make good all wants of repair, of which notice may be given or left. Not to permit any trade or business to be exercised or carried on on the said premises, and not to do anything which may lead to the annoyance of the neighbours. To leave every assignment or under-lease of the premises with , the solicitors of the landlord, together with the sum of £1, 1s., as a fee for the registration thereof, and, at the end of the term, to surrender up the premises, with the buildings thereon, and fixtures therein, in good, tenantable repair and condition. And also a clause of re-entry, on non-payment of the rent for twenty-one days after the same should be payable, and on the breach, non-observance, or non-performance of the covenants and conditions to be contained in such lease.</p>
<p>Landlord to covenant for quiet enjoyment.</p>	<p>The landlord will enter into the usual covenant for quiet enjoyment.</p>
<p>Landlord's title not to be investigated.</p>	<p>The tenant shall not investigate or make any inquiry as to the landlord's title (n).</p>
<p>Costs of lease and counterpart.</p>	<p>Every lease, and the counterpart thereof, shall be prepared by the solicitors of the landlord at the expense of the tenant, who shall execute the counterpart, and deliver the same to the landlord, and shall also pay the costs of the preparation of these presents.</p>

(n) As to "title," see *ante*, p. 102.

Provided always, and it is hereby agreed and declared, that, if the tenant shall not pay the rent, or the proportion thereof, which may, for the time being, be payable on the day on which the same ought, under and by virtue of these presents, to be paid, or within twenty-one days thereafter; or in case the tenant shall not observe and perform the conditions and provisions of these presents, then it shall be lawful for the landlord, his heirs or assigns, to re-enter upon the hereditaments hereby agreed to be leased, or such part thereof as shall remain undemised, and to hold and enjoy the same, freed and absolutely discharged from these presents, and all right and interest of the tenant therein under and by virtue hereof (k).

CHAP. I.
Proviso for re-entry.

These presents are intended to operate as an agreement only and not as a lease of the premises, or to give to the tenant any legal interest therein. As witness, &c. (l).

4. *Lease to Builder's Nominee of Lands previously agreed to be leased.*

This indenture, made the day of 18 , between Parties AB, of , who and whose heirs and assigns or other person or persons entitled to the reversion of the hereditaments thereby demised, are hereinafter referred to as "the lessor," of the first part, CD of , of the second part, and EF, of , who and whose executors, administrators, and licensed assigns are hereinafter referred to as "the lessee," of the third part.

Witnesseth that in consideration of the said CD having erected the house hereby demised, and of the rent hereinafter reserved, and of the covenants and conditions herein contained, and on the lessee's part to be paid, observed, and performed, he, the said AB, at the request and by the direction of the said CD, doth hereby lease unto the lessee All that piece or part of land situate at , in the parish of and county of , as the same is delineated in the plan drawn in the margin of the skin of these presents, and also the dwelling-house and stables erected thereon, and known as , together with the rights, members, and appurtenances to the said hereditaments belonging or appertaining, or with the same, or any of them, now or heretofore demised, used, occupied, or enjoyed. And also with liberty for the lessee, his family, servants, and

(k) As to forfeiture, re-entry of (l) If the property demised is situate in a register county, this waiver generally, see Part 3, Ch. 3, agreement should be registered.

CHAP. I.

friends, either with or without perambulators or other carriages for children, to walk in, use, and enjoy the ornamental garden in front of the said dwelling-house.

Habendum.

To have and to hold the said hereditaments hereinbefore expressed to be hereby demised unto the lessee for a term of

Reddendum.

years from the day of 18, *yielding and paying* therefor the yearly rent of £ by four equal quarterly payments on the day of , the day of , the day of , and the day of in each year, the first quarterly payment to be made on the day of 18, and the last quarterly payment to be made on the day of next preceding the expiration of the said term. And yielding and paying in the event of the said term being determined by re-entry under the provision for re-entry hereinafter contained, a proportionate part of the said rent for the fraction of the current quarter up to the day of such re-entry.

Covenants by
lessee.
Rent.

And the lessee doth hereby covenant with the lessor in the manner following:—That he, the lessee, will pay the rent on the days hereinbefore named for the payment thereof. And

Taxes.

will pay all taxes, rates, and impositions, whether parliamentary, municipal, parochial, or otherwise, which now are, or hereafter may be, imposed on the said premises, or in respect of the house and buildings erected thereon. And will at all times during the said term keep the said house and buildings in good repair and condition, and particularly will, in every

Repairs.

year (*m*) of the said term, paint with three coats of good oil colour all the outside of the house and buildings previously or usually painted, and in every year (*n*) of the said term will paint with two coats of good oil colour the inside of the said house and buildings. And will permit the lessor or his agent to enter upon the premises hereby demised, to view the state and condition thereof. And will forthwith make good all defects and wants of repair, notice of which shall have been given by the lessor to the lessee or left upon the premises. And will insure the house and buildings in the

Insure.

Insurance Office, or in some other office to be approved of by the lessor. And in the case of loss or damage by fire will lay out the moneys to be received from such insurance in reinstating and restoring the said house and buildings, or such part thereof as shall have been destroyed and damaged (*o*). And if the money received from such insur-

(*m*) Usually three years.
(*n*) Usually seven years.

(*o*) See ante, p. 178.

ance shall be insufficient to restore and reinstate the said house and buildings, or such part thereof as shall be destroyed or damaged by fire, then the lessee will provide such a sum of money as shall be sufficient to complete the restoration and reinstatement of the said house and buildings. And will contribute the yearly sum of £ for the purpose of keeping the said ornamental garden in good order and condition. And will not use the said house and buildings for the purpose of any trade or business without having previously obtained (p) the written consent of the lessor. And will not do or suffer to be done upon the premises anything which may cause an annoyance or become a nuisance to the neighbours. And will upon every assignment or underlease leave such assignment or underlease with the solicitors of the lessor, together with a sum of £ as a registration fee. And will at the expiration, or sooner determination, of the said term deliver up the said premises in good condition and sound repair.

To keep up garden.
Not to carry on any trade,
Or cause nuisance.
To deliver up on expiration.

Provided always, and these presents are upon this express condition, that if the rent hereby reserved, or any part thereof, whether the same shall have been legally demanded or not, shall be in arrear for twenty-one days, or if and whenever there shall be a breach of the covenants and conditions herein contained, and on the lessee's part to be observed and performed, the lessor may enter upon any part of the premises in the name of the whole, and thereupon the said term of years shall cease and determine.

Proviso for re-entry.

And the lessor doth hereby covenant with the lessee that it shall be lawful for the lessee at all times during the said term hereby granted, peaceably and quietly to hold and enjoy the premises hereinbefore expressed to be hereby demised without any interruption or disturbance by the lessor or any person or persons claiming through or under him. In witness, &c.

Covenant for quiet enjoyment.

5. *Agreement to Let Rooms in a House.*

Memorandum of Agreement made and entered into the day of One thousand eight hundred and seventy-
, between hereinafter called the lessor of
the one part, and hereinafter called the lessee of the
other part. The lessor hereby lets and the lessee hereby takes
which said rooms and premises form part of a mes-
suage or tenement belonging to the lessor situate on the

Parties.
Parcels.

(p) For form of license, see *post*, p. 332.

CHAP. I.

side of Street, in the county of , known as . And also the water-closet on the floor of the said messuage or tenement for the term of years, from the day of , One thousand eight hundred and , at the yearly rent of pounds, the said rent to be payable by equal quarterly payments on the usual quarter days, free from all deductions whatsoever, the first quarterly payment to be made on the day of , One thousand eight hundred and . And the said landlord and the said tenant hereby mutually agree as follows:—The said landlord will pay all taxes, rates, assessments, or impositions, parliamentary, parochial, or otherwise, charged or to be charged on the said premises, except such as are hereinafter agreed to be paid by the said tenant. And also shall and will permit the said tenant, his executors, administrators, or assigns, so long as he shall pay the rent hereby reserved and observe this agreement, to have, hold, and quietly occupy the said rooms and premises in manner aforesaid. And also in case of the said rooms and premises, or any part thereof, being destroyed or damaged by fire, will, with all reasonable speed, at his own expense, rebuild and restate so much of the said premises as shall be so destroyed or damaged as aforesaid. And the said tenant will, during the said term, pay all water-rates and charges for gas in respect of the said rooms and premises, also the sum of one shilling per week for corridor and staircase gas. And also will not, at any time during the said term, affix to the windows of the said rooms and premises, externally or internally, any venetian or other blinds, except of such colour and construction as shall be previously approved by the said landlord, his heirs or assigns, or his or their surveyor for the time being. And also will at all times during the said term, whether required to do so by notice or not, at his own expense, and as often as occasion may require, well and sufficiently repair, maintain, paint, grain, empty, amend, and keep the internal parts of the said rooms and premises, and all pipes, sinks, drains, pumps, water-closets, and appurtenances belonging, or which shall or may belong to the same, in good and tenantable repair and condition, reasonable use, and fair wear and tear and damage by fire in the meantime only excepted, and also will once in every month during the said term, have all chimneys and flues belonging to the said rooms and premises thoroughly swept and cleansed. And also will, during the said term, clean all the windows of and belonging to the said rooms and premises at least once in every two months. And also will, at the expiration or other sooner determination of

Rent.

Covenants by landlord.

By tenant.

the said term, peaceably and quietly, surrender and yield up unto the landlord, his heirs and assigns, the said rooms and premises with the appurtenances, in such good and tenantable repair and condition as aforesaid, together with all improvements, additions, and other things, coming within the denomination of landlord's fixtures, which now are, or shall be at any time during the said term, fixed or belonging to the said premises, or any part thereof. And will permit the said landlord, his heirs or assigns, or his or their agents or surveyors, at any time or times, to enter into and upon the said premises, and take a schedule of such fixtures so to be yielded up as aforesaid, and also to view, search, and see the state and condition of the said premises, and of all such defects and wants of repair on any such view found to give or leave notice in writing at or upon the said premises to or for the said tenant, his executors, administrators, or assigns, to repair and amend the same, and the said tenant, his executors, administrators, and assigns, will, within three calendar months after receiving such notice, well and sufficiently repair and amend the same accordingly (reasonable use and fair wear and tear and damage by fire excepted), but nevertheless without prejudice to any other right or remedy of the said landlord, his heirs, or assigns in respect thereof: and also will permit the said landlord, his heirs or assigns, or his or their agents or surveyors, and with or without workmen and others, at all times to enter in and upon the said premises, and every part thereof, for the purpose of repairing or painting the outside thereof, or of carrying out and completing any structural or other repairs, and of making any alteration and addition which shall or may be required in or to the building and premises, of which the said rooms and premises form part, or in or to any premises adjoining or contiguous thereto, and to cleanse, empty, or repair, any of the sewers, drains, gutters, or pipes, belonging to the said building and premises or any part thereof. And also will not, without the consent in writing of the said landlord, his heirs or assigns, assign, underlet, or part with the possession of the said rooms and premises or any part thereof, or any interest therein. All assignments and agreements for underletting shall be prepared by the solicitor of the said landlord, his heirs or assigns, at the expense of the said tenant, his executors, administrators, or assigns. And also will not use the said premises, or any part thereof, or permit the same to be used or occupied for any unlawful or immoral purpose, or for any purpose other than as residential chambers, without the consent in writing of the said landlord, his heirs or assigns, and will not deposit any stores of coal or

CHAP. I.

Proviso for re-
entry.

Costs of agree-
ment.

any combustible or offensive goods, provisions, or materials, upon the said premises, nor do or permit to be done any waste, spoil, or destruction, or any act, matter, or thing which shall be or become a nuisance or annoyance to the said landlord, his heirs or assigns, or his or their tenants or the tenant or occupier of any of the adjacent premises. And also shall not, nor will, without the previous consent in writing of the said landlord, his heirs and assigns, pull down or alter or in any way interfere with the construction or arrangement of the premises, or cut, alter, or injure any of the walls, timbers, or floors of the said demised premises or any part thereof, or in any way deface or disfigure the walls or ceilings thereof, nor put up or hang out any signboard, placard, notice, or advertisement. Provided always, and these presents are upon this express condition, that if and whenever any part of the said rent hereby reserved shall be in arrear or unpaid for the space of twenty-one days (whether the same shall have been legally demanded or not), or if and whenever the tenant, his executors, administrators, or assigns, shall carry on upon the said premises any trade or business, or use or occupy the said premises or any part thereof, or permit the same to be used or occupied for any purpose whatever other than residential chambers without such license as aforesaid, or if and whenever there shall be a breach, non-observance, or non-performance of any of the clauses and stipulations hereinbefore contained, then and in any of such cases it shall be lawful for the said landlord, his heirs and assigns, or for his or their agents for the time being in his or their name, and on his or their behalf, into the said premises or any part thereof in the name of the whole to re-enter and the same to re-possess and enjoy as in their first and former estate anything hereinbefore contained to the contrary notwithstanding, but without prejudice to any rights or remedies which shall have accrued to the said landlord, his heirs or assigns, previously to such re-entry as aforesaid. The costs and expenses attending the preparation and execution of this agreement () shall be paid by the said tenant. As witness, &c.

6. *Agricultural Lease for Twenty-one Years (g).*

Parties. This indenture, made the day of 18 , between
AB, of , hereinafter called "the lessor," of the

(g) This lease is based upon the form of agreement recommended by the Royal Agricultural Society. It should be borne in mind that the custom as to farming and emble-
ments, &c., varies in different countries. See a list of them in Woodfall's *Landlord and Tenant*, 11th edit., p. 721.

one part, and CD, of , hereinafter called "the lessee," CHAP. I.
of the other part.

Witnesseth that in consideration of the rent hereinafter reserved, and of the covenants and conditions hereinafter contained, and on the part of the lessee to be paid, observed, and performed, he the lessor doth hereby demise unto the lessee, his executors, administrators, and assigns, All that farm known as farm, situate in the parish of and county of , as the same is now, or was lately, in the occupation of , the particulars whereof are specified in the schedule hereunder written, with the rights, members, and appurtenances thereto belonging, or appertaining. Except out of this present demise, all timber (r) and timber-like trees, saplings, and pollards now growing, or which may hereafter grow upon the premises. And also all mines, minerals, quarries, stone, brick, earth, clay, gravel, and other substances, in, upon, or under the premises. The lessor, his heirs and assigns, paying compensation to the lessee, his executors, administrators, or assigns, for all damage done, by the exercise of the rights hereinbefore reserved, such compensation, in case of dispute, to be settled by arbitration, as hereinafter provided. And also reserving liberty for the lessor, his heirs and assigns, and all persons authorised by him or them, with or without horses, carts, and carriages, to enter and remain upon the said premises for the purpose of marking, felling, grubbing up, lopping, and topping the said timber, timber-like trees, saplings, and pollards, now growing, or which may hereafter grow upon the said premises. And of planting trees upon any part of the premises. And of searching for, getting, digging, winning, working, disposing of, and carrying away any mines, minerals, quarries, stone, brick—earth, clay, gravel, and other substances excepted out of these presents, and of making any shafts, pits, adits, drains, and roads, and of erecting any buildings, works, and machinery, which may be necessary for working any mines, and obtaining, getting, working, and rendering fit for sale the said minerals, stone, brick-earth, clay, gravel, and other substances. And also reserving liberty for the lessor, his heirs, and assigns, and all persons authorised by him to enter and remain upon the said premises for the purpose of draining, enclosing, improving, and building upon the same, or any part thereof. And of hunting, sporting, and killing, or taking game or fish thereon; and of viewing the condition of the said premises, and for all other reasonable purposes. *To have and to hold* the said farm and hereditaments hereby demised,

Parcels.

Exception of timber.

Reservation to fell timber.

Search for and work mines.

Making improvements.

Sporting.

Habendum.

(r) As to timber trees, see *ante*, p. 60.

CHAP. I.	except and reserved as heretofore expressed, unto the lessee, his executors, administrators, and assigns, for a term of years from the day of 18, <i>Yielding and paying</i> therfor during the said term the certain yearly rent of £ by equal half-yearly payments on the day of and the day of in each year, the first payment to be made on the day of 18, and the last payment to be made one calendar month before the expiration of this lease. And <i>yielding and paying</i> a further yearly rent of £ an acre for every acre, and so in proportion for a greater or less quantity than an acre of land, which (now being meadow or pasture) shall be broken up without the previous consent in writing of the lessor, his heirs or assigns; and a further yearly rent of £ an acre for every acre (and so in proportion for a greater or less quantity than an acre) of land which shall not be cultivated or managed according to the course of husbandry hereafter prescribed. Such further yearly rents to be paid by equal half-yearly payments on the day of and the day of in each year, and to continue payable during the continuance of this present lease. The first of such last-mentioned half-yearly payments to be made on the first of the said half-yearly days of payment after such breaking up, or such improper cultivation or management, and the last payment to be made one calendar month before the expiration of this lease. And <i>also yielding and paying</i> in the event of and immediately upon the said term being determined by re-entry under the proviso hereinafter contained a proportionate part of the rent hereby reserved, and of any further rent or rents then payable for the fraction of the current half year. And the lessee doth hereby for himself, his heirs, executors, and administrators, covenant with the lessor, his heirs, and assigns in manner following:—
Reddendum fixed yearly rent.	
Further rent for breaking up meadow land.	
Not cultivating according to the lease.	
Reddendum of proportionate part of rents in the event of re-entry.	
Covenants by lessee.	
To pay rent.	That the said lessee, his executors, administrators, or assigns will pay the said yearly rent of £ , and also the further rents if payable at the times hereinbefore appointed for payment thereof. And also all rates, taxes, tithe—rentcharge, and other payments and assessments now charged upon, or hereinafter to be charged upon the said premises. And that the lessee, his executors, administrators, or assigns shall with his or their family inhabit the farmhouse hereby demised, and make the same his or their usual place of abode. And will not assign or underlet the said premises without the previous written consent of the lessor, his heirs or assigns.
Rates, taxes, &c.	
To reside.	
Not to assign or underlet.	
Do the repairs.	And will keep the inside of the farmhouse and of all buildings on the said farm, and all the gates, stiles, rails and pale fences, hedges, ditches, watercourses, roads, bridges, and every

part of the said premises (except the outer walls and roofs of the said farmhouse and buildings) in good repair, order, and condition. The lessor, his heirs and assigns providing the timber in the rough, bricks and lime necessary for such repairs, the lessee carrying the said materials provided by the lessor, his heirs and assigns, from any place not exceeding miles from . And will paint with two coats of good

CHAP. I.

oil colour in every year of the said term all the inside part of the farmhouse and buildings heretofore and usually painted, and in every year of the said term the outside part of the said farmhouse and buildings, and all posts, rails, fences, and wires heretofore and usually painted; and will, in every year of the said term, tar all the gates, posts, rails, and fences heretofore and usually tarred. And will, at his own cost, during the said term keep the said farm-house and buildings insured against loss or damage by fire in the

To paint inside.

Tar rails, &c.

Insure farm-house and buildings.

Insurance office, or in such other office or offices as shall be approved of in writing by the lessor, his heirs or assigns; and will, when required, produce to the lessor and his heirs, and all persons authorised by him, the policies of such insurance and the receipts for the premiums payable in respect thereof; and if the said farmhouse and buildings, or any part or parts thereof, shall be destroyed or damaged by fire, will lay out and expend all moneys to be received by virtue of such insurance in repairing, reinstating, and rebuilding the said farmhouse and buildings. And will not cut down, lop, or top any timber, timber-like trees, saplings, and pollards now growing, or which may hereafter grow upon the said premises. And will, by sufficient fencing, protect the same trees, saplings, and pollards from sheep, cattle, and other animals. And will cultivate and manage the said farm and lands in a good and husbandlike manner.

To produce policies and receipts.

To apply insurance monies in re-building houses.

Not to cut trees.

And protect the same by fencing.

Cultivate farms in a good manner.

Not to plant more than two wheat crops.

Will not have more than three-fifths under corn, and will have one-fifth under clover, and one-fifth under roots. Not to mow more than once a year.

And will not plant on any part of the said lands two crops of wheat, nor more than two white straw crops in succession. And will not in any one year have more than three-fifths of the arable land under corn or seed crops of any kind. And will, in each and every year, have at least one-fifth under clover and grass seeds, and one-fifth under roots. And will not mow any part of the meadow or pasture land hereby demised more than once in any year. And will, at the proper time in each year, and in a husbandlike manner, lay and spread upon the meadows or pasture land which may have been mown a sufficient quantity of good farmyard manure, or other manure of equal quality. And will not plough up or convert into tillage any part of the meadow or pasture land hereby demised without the consent in writing of the lessee, his heirs, and assigns. And will not allow any thistles, nettles,

To manure every year.

Not to plough up the meadow land.

Not to allow thistles, &c., to seed.

CHAP. I.

To consume all
fodder, hay, &c.,
on farm.

or docks to seed on any part of the said farm, or any weeds in the hedges, ditches, and waste lands. And will consume upon the said farm all the fodder, hay, straw, haulm, and roots of every description, which shall be grown upon the said farm, except tons of potatoes, tons of hay, and tons of straw, which may be sold in any year, the lessee, his executors or administrators, undertaking to lay or put upon the said farm a quantity of manure equal to the value of the said produce which may be sold. And will on the day of , and on each subsequent day hereby

To leave straw,
&c., on premises.

appointed for payment of rent, deliver to the lessor, his heirs or assigns, an account of the quantity of produce sold, and the value of artificial manure laid and put upon the farm and premises since the commencement of the tenancy or the last payment of rent. And at the expiration of the said lease will leave on the premises to be valued one-tenth of the hay and straw got in during the previous year, and will not remove any farmyard manure, dung, or composition whatever, but will leave the same for the lessor, his heirs and assigns. And will, during months previous to the expiration of the lease, permit the lessor, his heirs and assigns, to enter upon the farm and premises to plough or work any land, to plant any seeds, and to cultivate and manage the said farm as he and they shall think fit. And will not graze the meadow land after the day of , or the young seeds after the day of , previous to the expiration of the lease. And will plough and properly manage the stubbles, plant the corn, irrigate the meadows, and do any other work which the lessor, his heirs and assigns, shall by writing under his or their hands require to be done previous to the expiration of the lease. And will at all times during this present lease permit the lessor, his heirs and assigns, and all persons authorised by him or them, to enter and

Preservation of
game, &c.

remain upon the said premises, to preserve the game and fish thereon. And will give to the lessor, his heirs and assigns, immediate notice of any person or persons who shall hunt, fish, shoot, or sport upon the said farm and premises. And will permit the lessor, his heirs or assigns, to bring any action or proceeding in the name or names of the lessee, his executors, administrators, or assigns, against any person or persons hunting, fishing, shooting, or sporting upon the said farm and premises. And will permit the lessor, and all persons authorised by him or them, to enter upon the said premises and view the condition thereof; and will immediately repair the farmhouse and buildings, and the gates, stiles, rails and pale fences, and will clip and trim the hedges, repair the roads and bridges, scour and clear the ditches and water-

To permit lessor
to enter.
To repair after
notice.

courses, and do all other works which the lessor, his heirs and assigns, shall by notice in writing require to be done; and if the lessee, his executors, administrators, or assigns shall neglect to do such repairs, scouring, cleansing, and works within one calendar month after such notice as aforesaid, the lessor, his heirs and assigns may do the same, and may recover from the lessee, his executors, administrators, and assigns the costs of doing the said repairs, scouring, cleansing, and works. And in each year, when required by the landlord, do one day's team-work, in respect of every sum of £50 or fraction of £50 payable by the lessee as rent. And will at the expiration of the said lease surrender the said farmhouse, buildings, farm, and premises in good repair and condition, and well cultivated. Provided always, and these presents are upon this express condition, that if any part of the said several rents hereby reserved shall be in arrear for twenty-one days, whether the same shall have been legally demanded or not, and if there shall be a breach of any of the covenants by the lessee herein-contained, the lessor, his heirs and assigns, may re-enter upon any part of the premises in the name of the whole, and thereupon the said term of years shall absolutely determine.

CHAP. I.

To surrender.

Proviso for re-entry.

And the lessor doth hereby for himself, his heirs, executors, and administrators, covenant with the lessee, his executors, administrators, and assigns in manner following:—

Covenants by lessor.

That he, the lessor, his heirs and assigns, will keep the outer walls and roofs of the said farmhouse and buildings in good repair, order, and condition. And will, within miles from , provide the timber in the rough, bricks and lime necessary for repairing the inside of the farmhouse, and of all buildings on the said farm, and the gates, stiles, rails and pale fences, hedges, ditches, watercourses, roads, bridges, and every part of the said premises, and that the lessee, his executors, administrators, or assigns, paying the rents hereby reserved, and performing and observing the covenants therein contained, may peaceably hold and enjoy the said premises during the said term without any interruption by the lessee, his heirs, or assigns, or any person or persons lawfully claiming through him, them, or any of them.

All valuations to be made under or by virtue of these presents shall be made by two persons, one to be named by the lessor, his heirs or assigns, and the other to be named by the lessee, his executors, administrators, or assigns. If and whenever any dispute shall arise between the lessor, his heirs and assigns, on the one part, and the lessee, his executors, administrators, or assigns, on the other part, touching these presents, or anything herein-contained, or

Valuations.

Arbitrations.

CHAP. I.

the construction hereof, or any matter in any way connected with these presents, or the operation hereof, or the rights, duties, or liabilities of either party in connection with the premises, then, and in every such case, the matter in difference shall be referred to two arbitrators or their umpire, pursuant to, and so as with regard to the mode and consequence of the reference, and in all other respects to conform to the provisions of the "Common Law Procedure Act," 1854, or any then subsisting statutory modifications thereof.

Agr. Hold. Act
not to apply.

"The Agricultural Holdings (England) Act," 1875, shall not apply to these presents. In witness, &c.

Schedule.

7. *Coal Lease under the Settled Estates Act, 40 & 41 Vict. cap. 18 ().*

This indenture, made the day of 18 . As to the terms and provisions hereof with the approbation of the Honourable Sir —, one of the judges of the High Court of Justice, as appears by the certificate of the Chief Clerk, dated the day of 18 , and made in pursuance of an order made on the day of , in the matter of an Act passed in the session of Parliament held in the 40th and 41st years of Her present Majesty, the short title of which is "The Settled Estates' Act," 1877; and as to the persons who are named as lessors, subject to an order of the said Court to be obtained for that purpose in the said matter, and which order is intended to be endorsed hereon between AB and CD, hereinafter referred to as the lessors of the one part, and EF, hereinafter referred to as the lessee of the other part.

Witnesseth that, in consideration of the rents hereinafter reserved, and of the covenants by the lessee hereinafter contained, they, the lessors, in exercise of the powers vested in them by the said order of the day of 18 , do hereby demise unto the lessee, his executors, administrators, and assigns, All that seam or bed of coal called within , and under the pieces or parcels of land situated in the parishes of , in the county of , delineated in the plan drawn on the back of the skin of these presents, and therein coloured . Together with liberty for the lessee, his executors, administrators, and assigns, without entering upon the surface of any other part of the said pieces or parcels of land except the pieces of land coloured in the said plan, to search for, win, get, work, raise, carry away, and dispose of the said coal hereby demised. And for the purposes aforesaid, or any of them, to enter upon any part of the surface of the said

Lessors in
exercise of order.

Demise to
lessee.

Parcels.

Right to enter to
search for coal.

pieces of land coloured in the said plan, but not elsewhere; and therein or thereupon to sink, erect, maintain, and use any pits, shafts, engine-houses, buildings, brick-kilns, pit-hills, spoil-banks, roads, railways, reservoirs, water-courses, drains, and machinery, and to dig and get stone, brickclay, sand, and other materials, and to dress the said stone, and burn the said brickclay, sand, and other materials into bricks, the said stone and bricks to be used in and about the said mine and works, but not for any other purpose, and to construct, make, maintain, and do all other works and things which may be necessary or convenient. And below the surface of the said pieces or parcels of land coloured to drive, make, erect, maintain, and use any levels, drifts, tunnels, airways, inclined planes, railways, tramways, horseways, roads, drains, steam-engines, pumps, and underground works whatsoever which the lessee, his executors, administrators, and assigns, shall find or consider necessary or convenient. And also, with or without locomotive engines, horses, waggons, and carts, to have free ingress, egress, and regress to and from the said mine and works. And for that purpose to enter upon any part of the surface of the said pieces or parcels of land coloured, to make such waggon-roads, tramways, or railways, and approaches to the said mine and works, and to do all reasonable acts and things necessary or proper for carrying away the said coal. And also with liberty to and for the lessee, his executors, administrators, and assigns, to enter upon the surface of the said pieces or parcels of land, or any part or parts thereof, not being or forming part of the land called Park, coloured in the said plan, to sink such shafts as may be necessary for the proper ventilation of the said mine and works. And also for the accommodation of the persons employed in or about the said mines and works, to erect not more than 100 cottages upon the piece of ground coloured in the said plan, and to erect not more than six messuages or tenements in or upon some part of the said piece of land coloured on the said plan, he, the lessee, his executors, administrators, or assigns, first giving one calendar month's notice in writing to the respective tenants and occupiers of the lands to be entered upon or used in exercise of the liberties hereby granted, or leaving the same for them at their respective usual places of abode, and specifying in every such notice the names or situations of the fields or field and quantity of land intended to be entered upon or used by the lessee, his executors, administrators, and assigns, and also making full compensation to the respective tenants or occupiers for the time being of the land and premises so en-

CHAP. I.

To make shafts, &c.

To make levels, drifts, &c.

Ingress, egress, and regress.

To make tramways.

Ventilating shafts.

To build cottages.

Lessee to give notice to occupiers.

To make compensation.

CHAP. I.

Exceptions.

Coal within a
radius of 100
yards from shaft.

Ribs and pillars
of coal.

Exception as to
entry by lessor.

tered upon and used, for all injury and damage to be done to the said lands, and to the corn and other crops then standing or growing thereupon, such compensation, in case the said parties cannot agree respecting the same, to be determined by arbitration, pursuant to the clause hereinafter contained. Except nevertheless and reserved all mines and minerals, stone, clay, and valuable earth whatsoever in and under the said pieces or parcels of land coloured on the said plan, other than the said bed or seam of coal hereby demised, or intended so to be. And except and reserved to the person or persons for the time being entitled to the said excepted mines, minerals, stone, clay, and valuable earth, full and free liberty to use, occupy, and enjoy the above-excepted premises, and to work, dig, break up, get, carry away, convert, and sell the above-excepted premises. And for the purposes last aforesaid, and without making any payment or compensation in respect thereof, to make use of and deepen all or any of the pits or shafts which may have been made or sunk by the lessee, his executors, administrators, or assigns, on any of the said premises, when he, the lessee, his executors, administrators, or assigns, shall have discontinued the using of such shafts, and to erect and construct all such erections, furnaces, kilns, works, machinery, and conveniences as the person or persons for the time being entitled as aforesaid may think necessary for all or any of the purposes aforesaid. And also except and reserved out of these presents all the coal which lies within a radius of 100 yards from the walls of any shaft or pit, which said coal is to be left unwrought for the efficient support of the pit shafts and machinery, but (by way of grant and not exception) with liberty for the lessee, his executors, administrators, and assigns to cut and drive the necessary roads through the said excepted coal. And also except and reserved out of these presents a rib or pillar of coal of not less than 50 yards wide, extending between the main working shafts and any air-shaft which may be sunk, and which rib or pillar of coal is to be left unwrought for the support of the air-course or communications between such shafts, but (by way of grant and not of exception) with liberty for the lessee, his executors, administrators, and assigns, to cut and drive through such excepted rib or pillar of coal openings of not more than 4 yards wide, and whose centres shall not be nearer to another than 20 yards. And also except and reserved to the said lessors, their heirs and assigns, and their agents, servants, and workmen, from time to time, and as often as they or he shall think proper, liberty to enter upon the said demised premises, or any part or parts thereof, to view the state thereof, and to

inspect, examine, and measure the mine and workings, or any pits and shafts which may be made or sunk by the lessee, his executors, administrators, or assigns; and for the purposes aforesaid to use the tackle, machinery, ropes, buckets, and other conveniences within the said works or belonging or appertaining thereto as they shall think proper. *To have and to hold* the said premises hereby demised and granted or intended so to be unto the lessee, his executors, administrators, and assigns, for a term of years, from the day of 1872, *Yielding and paying* therefor during the said term the certain yearly rent hereinafter mentioned, (that is to say,) during the first two years of the said term the yearly rent of £1000, during the third year of the said term the yearly rent of £1500, during the fourth and every subsequent year of the said term the yearly rent of £2000; the said certain yearly rent to be payable by equal quarterly payments on the day of , the day of , the day of , and the day of in each year without any deduction or abatement whatsoever (except the landlord's property tax), the first payment of rent to be made on the day of next. And also *yielding and paying* on the quarterly days appointed for payment of rent a footage rent after the rate of £30 for every acre in extent, being one foot in thickness (and so in proportion for any less quantity than an acre, and for any greater or less thickness than one foot), of so much of the said coal hereby demised as shall have been worked and gotten by the lessee, his executors, administrators, or assigns, in the course of the three calendar months preceding each day of , day of , day of , and day of . And also *yielding and paying* during the said term for every acre of the surface of land which shall from time to time be entered upon and used and occupied by the lessee, his executors, administrators, and assigns, in pursuance of any of the liberties, powers, and authorities hereinbefore granted, the yearly rent of £3, and so in proportion for any less quantity than an acre, by four equal payments in each year, on the day of , the day of , the day of , and the day of , without any deduction or abatement whatsoever (except the landlord's property tax), the first payment thereof to be made on the first of the said days of payment which shall happen next after the said lands shall be so entered upon and occupied by the lessee, his executors, administrators, and assigns as aforesaid, the said surface rent to continue payable during all the then residue of the said term, whether the said lands shall continue to be used by the lessee, his executors, administrators, or assigns, or not. And also *yield-*

CHAP. I.

Habendum.

Lessee for years.

Certain yearly rent.

And footage rent.

Outstroke rent.

CHAP. I.

ing and paying a royalty in right of outstroke from other mines, after the rate of £ per ton of twenty cwt., for all the coal, minerals, and substances brought to the surface in the course of the preceding three calendar months from any mine under the surface of any neighbouring lands other than the lands coloured , and in the said plan, through any pits or shafts which may be made in exercise of the powers and liberties hereinbefore contained, every payment of such royalty to be made on such of the said days hereinbefore appointed for payment of rent as shall occur next after the said right of outstroke shall have been exercised. Provided always, and it is hereby agreed and directed, that the amount of footage rent which may from time to time be payable on any of the said quarterly days of payment, under the reservation hereinbefore contained, shall be ascertained in manner following: The quantity of coal gotten in the preceding three calendar months shall be ascertained by measurements made underground, such measurements to be taken in feet and fractions of one foot down to one inch, but not less; and the acreage or superficial measure, and the thickness of the coal, shall be measured at right angles to one another, so as to ascertain the true cubical contents of the coal gotten; and the ribs or pillars of coal to be left, in pursuance of the covenant hereinafter contained, shall be omitted from such measurements; and in measuring the thickness of the coal, "Bat," or unmarketable coal, shall not be taken into account; and in measuring the acreage or superficial measure, faults shall not be included, and a proper allowance shall be made for inferior coal, such allowance in case of difference to be settled by two referees, or their umpire, to be appointed under the clause for arbitration hereinafter contained. Provided always, and it is hereby agreed and declared, that the lessee, his executors, administrators, and assigns, may in every year of the said term, work, and get, without paying any footage rent for the same, such a quantity of the said coal hereby demised as at the aforesaid footage rents would yield a rent equal in amount to the certain yearly rent hereinbefore reserved as aforesaid for such year or years respectively.

Average clause. Provided always, and it is hereby agreed and declared, that if and whenever the lessee, his executors, administrators, or assigns, shall for any one quarter of a year have paid the certain or minimum rent then payable without having actually gotten in such quarter of a year such a quantity of coal as, according to the footage rent hereinbefore reserved, would have produced the certain quarterly rent then payable, and the lessee, his executors, administrators, or assigns, shall in any subsequent quarter or quarters of a year get such a quantity

of coal as, at the footage rent aforesaid, would produce a rent exceeding the certain quarterly rent payable in respect of such subsequent quarter or quarters, the lessee, his heirs, administrators, and assigns, shall not be liable to pay any rent, except the certain quarter's rent for the time being payable, for so much of the coal so gotten as, at the footage rent aforesaid, would make up the deficiency of any preceding quarter or quarters of a year, but no excess of footage rent paid for any preceding quarter of a year shall be allowed towards making up any deficiency in a subsequent quarter of a year. And the lessee doth hereby for himself, his heirs, executors, and administrators, covenant with the lessors, their heirs and assigns, in manner following :—(That is to say), that he, the lessee, his heirs, administrators, or assigns, will pay the said several rents and royalties hereinbefore reserved and made payable as aforesaid, on the days, at the times, and in the proportions and manner hereinbefore mentioned and apportioned, without any deduction or abatement whatsoever for taxes or otherwise (except the landlord's property tax). And further, that he, the lessee, his executors, administrators, and assigns, will, from time to time, and at all times during the continuance of the said term, pay, bear, and discharge all land-tax, and all other taxes, tithes, rent-charges, assessments, and impositions whatsoever, parochial, parliamentary, or otherwise, now imposed, or hereafter to be imposed, in respect of the said premises, or upon the several rents or royalties, or upon the works to be carried on in pursuance of these presents, or upon the lessors or tenant, in respect thereof (except the landlord's property tax), and will at all times keep indemnified the lessors, their heirs, executors, administrators, and assigns, therefrom, and also will, in taking and breaking up under the liberties hereby granted, any part of the said lands for any of the works hereby authorised, remove the soil therefrom, and preserve the same on some convenient part of the said lands for the benefit of the lessors, their heirs and assigns. And also will forthwith commence, and afterwards with all due diligence and without delay or intermission, continue to open and work effectually the said coal hereby demised, according to the best improved system of working mines of a similar nature, and to the satisfaction of the lessors, their heirs and assigns, and to sink, make, erect, construct, maintain, and use such pits, shafts, steam-engines, winding gear, drifts, levels, works, and apparatus, as shall be necessary or proper, and of the best and most approved construction. And also will, in making and sinking under the liberties hereby granted

Covenants by lessee.

For payment of rent.

Taxes.

Preservation of soil.

To work coal.

CHAP. I. Supporting pit.	any pit in the said lands, well, and sufficiently, and in a work-maulike manner, line and support the sides thereof (except in the several places where the same shall pass through hard rock) with iron tubing or brick-work, with stout and substantial oak-curbs when necessary. And will during the said term
Repairs.	keep the same in good repair and working condition. And also will leave all the coal which lies within a radius of one
Leaving radius of 100 yards.	hundred yards from the walls of any shaft or pit unwrought and ungotten, save only by cutting and driving the necessary
Leaving pillar of 50 yards.	roads through the said excepted coal. And also will leave a rib or pillar of coal, of not less than fifty yards wide, extending between the main working shafts and any air-shaft which may be sunk, unwrought and ungotten, save and except by cutting or driving through such rib or pillar openings of not more than four yards wide, and whose centres shall not
To use stone, &c., and not to sell.	be nearer to one another than twenty yards. And also will use all the stone which may be dressed, and all the bricks which may be made by the lessee, his executors, administrators, and assigns, under the liberties hereby granted for the purposes of the colliery and works, or in building the cottages and houses to be built under the liberties hereinbefore contained, and will not sell any stone, brick, clay, or sand dug from the premises, or any bricks made therefrom. And
As to adjoining lands.	also will at the expense of the lessee, his executors, administrators, or assigns, fence off such parts of the said lands as shall hereafter be used for colliery purposes, or for any other of the purposes of these presents from the adjoining lands, and will hang sufficient gates in the fences for the convenient passing and repassing of the owners and occupiers of the said adjoining lands, who and whose servants and workmen shall always be at liberty, whether on foot or on horseback, with or without horses, cattle, carts, and carriages, to pass and repass through such gates, and over and across all ways or roads made or to be made, under the liberties hereinbefore contained, doing thereby as little damage as may be. And will throughout the said term, and at the like expense, keep the said fences and gates in such repair as aforesaid. And that the lessee, his executors, administrators, and assigns shall and will from time to time and at all times during the said term, make reasonable and fair satisfaction and compensation to every person whomsoever legally entitled thereto, on account of any injury or damage which may be sustained by him or her in consequence of the said works, or in execution of the powers, authorities, and liberties herein-after contained. And will defend, keep harmless, and indemnified, the lessors, their heirs and assigns, from and against all actions, claims, and demands, costs, damages, and
To indemnify lessors.	

expenses by reason or in consequence of any such injury or damage, or by reason or in consequence of the breach of any of the covenants on the part of the lessee, his executors, administrators, and assigns herein contained or in anywise relating thereto. And also that he the lessee, his executors, administrators, and assigns will so construct and use all furnaces in or upon the said lands as that the same shall effectually consume their own smoke. And will not in or upon any part of the said lands erect or use any coke-oven or blast-furnaces, and will not make any coke in open fires. And also will not erect or use works for the making of gas, or oil or chemical works of any kind or description whatsoever. And will not do or suffer to be done anything which may injure or damage the neighbouring and adjoining lands of the lessors and other persons, and will keep the lessors, their heirs and assigns, indemnified against all actions, claims, and demands by reason or in consequence of any injury or damage (whether of a residential or other character) which the said mine and works may do to the adjoining and neighbouring lands of the said lessors and other persons. And will not for any purpose whatever enter upon Park, or any part thereof. And will use his and their utmost endeavours to prevent the workmen and others employed in and about the said works from trespassing in or upon the neighbouring or adjoining lands of the said lessors and other persons, and particularly in search of game. And also will, during the said term hereby granted, keep accurate and correct plans and accounts of the workings of the said mine and premises, and of the coal, stone, brick-earth, clay, and sand, won and raised therefrom. And will, within three calendar months after the finding thereof, mark on such plan any faults which may be found in the said coal. And will permit and suffer the lessors, their heirs and assigns, and his or their agents or agent, from time to time, and at all reasonable times during the said term, to have free access to examine and inspect the said plans and accounts, and to take copies of the same, or of any part thereof. And that he, the lessee, his executors, administrators, or assigns, will, on the day of , the day of , the day of , and the day of in every year, and also on the determination or expiration of the term hereby granted, deliver to the lessors, their heirs and assigns, or their agent for the time being, true and fair accounts in writing of of the quantity in acres, roods, poles, and yards, and the thickness in feet and inches, and of the cubical contents of all the coal gotten from the said mine in the preceding three calendar months. And also a true and full account of

CHAP. I.

To consume smoke.

Not to enter Park.

Not to trespass.

To keep plans and accounts, &c.

CHAP. I.

all the coal, minerals, and other substances which shall have been brought to the surface by means of the pits or shafts to be sunk in exercise of the liberties hereby granted from any other mine, with all proper details, showing when such coal, minerals, and substances respectively were brought to the surface, and also a correct plan and admeasurement drawn upon a scale of not less than inches to an acre of the surface of the land, under which the said coal shall have been gotten, and will verify such accounts and maps from time to time in writing under the hand or hands of the lessee, his executors, administrators, or assigns, and his or their chief or only agent. And will, at the end or other sooner determination of the said term, give up to the lessors, their heirs or assigns, the said plans, or true and authenticated copies thereof, in good and perfect condition. And also will, at any time or times during the said term, permit and suffer the lessors, their heirs and assigns, and their agent or agents, servants and workmen, during the continuance of this present demise, conveniently to descend into the said mine by any pit or shaft, pits or shafts, used for the working thereof, to view and examine the workings of the said mine, and to make measurements and diallings, and to adopt any other proper means to ascertain the real state or condition of the said works and premises, and in so doing to use all or any of the horses, engines, machinery, and apparatus used in connection with the said works, and to have the assistance of any of the agents, workmen, and servants employed in the said works without paying or making compensation for such use and assistance. And also in like manner conveniently to ascend and return from the said works, such person or persons so descending and returning, interrupting as little as may be the carrying on of the said works. And further, that the lessee, his executors, administrators, or assigns, will not at any time assign, or underlet, or otherwise part with the said demised premises or any part thereof, for the whole or any part of the term hereby granted without the consent in writing of the lessors, their heirs or assigns, first had and obtained.

To permit lessor to enter to view.

And will, at the expiration or other sooner determination of the said term thereby granted, peaceably and quietly deliver up the works and premises in good and sufficient repair, state, and condition in all things; and also will, within twelve calendar months after the expiration or sooner determination of the said term at the like expense, restore and make good all fences upon any of the said lands which shall have been removed or broken by the lessee, his executors, administrators, and assigns, and fill up and level all

Not to assign.

To deliver up in repair.

To restore premises.

such pits, shafts, reservoirs, and other works as shall have been made or used by the lessee, his executors, administrators, or assigns, under or by virtue of these presents, except such as the lessors, their heirs or executors, shall in writing given to or left at any usual place of business of the lessee, his executors, administrators, or assigns, require him or them to leave open and unfilled up, and will leave all the said last-mentioned pits, shafts, reservoirs and works open and unfilled up accordingly, and in the same or in as good a state and condition as the same shall happen to be in at the time of giving or leaving such notice, reasonable wear and use thereof excepted, the lessee, his executors, administrators, and assigns being thenceforth discharged from fencing round or preserving the said last-mentioned pits, shafts, reservoirs, and works, and from taking any further care thereof, and from all damages that may afterwards happen in consequence of the same being so left open and unfilled up; and also will within the time aforesaid, at the like expense, clear so much of the said lands as shall be broken up, taken, covered, or used for colliery purposes by the lessee, his executors, administrators, and assigns, under or by virtue of these presents, from the horse-roads, tramways, railroads, pit-hills, slack, stone, and rubbish which shall have been made, thrown up, brought, placed, and left on the surface of the said lands by the lessee, his executors, administrators, or assigns, and which shall not be required by the lessors, their heirs and assigns, to be left, and will restore the surface of the said lands and render the same fit for agricultural purposes; and in case the lessee, his executors, administrators, or assigns shall neglect to clear the surface of the said lands and to restore the same, then he the lessee, his executors, administrators, or assigns shall pay to the lessors, their executors, administrators, or assigns a sum of £60 for every acre, and so in proportion for less than an acre which shall remain uncleared and unrestored; and will within twelve calendar months after the expiration or sooner determination of the said term, take down and remove any engine-house, workshops, offices, cottages, houses, and buildings, except such as the lessors, their heirs and assigns, shall, by notice in writing, given to, or left at any usual place of business of the lessee, his executors, administrators, or assigns, require to be left. Provided also, and it is hereby agreed and declared, that the lessee, his executors, administrators, or assigns, may, at any time before or within twelve calendar months after the expiration or sooner determination of the said term, take down, remove, and convert to his and their own use all such engines,

Penalty for not restoring premises.

Removal of buildings, &c.

CHAP. I.

Proviso for purchase of buildings, &c.

Proviso for re-entry.

pumps, iron-tubing, shafts, staiths, whimseys, ropes, rails, and works (except as hereinafter is mentioned), as shall have been erected, set up, fixed, or made upon, to, or under the said lands, or any part thereof, for getting, working, or carrying away the said coal hereby demised, he, the said lessee, his executors, administrators, and assigns, making reasonable satisfaction for all damage that may be done to the same lands by such removal. Provided always, and it is hereby agreed and declared, that in case the lessors, their heirs or assigns, shall, before or upon the expiration or determination of the said term, be desirous of purchasing all or any of the engines, pumps, iron-tubing for pits or shafts, staiths, whimseys, ropes, buildings, rails, works, tools, implements, utensils, or materials for the time being, used or employed in or about the working of the said coal hereby demised, and of such desire shall give calendar months' previous notice in writing to the lessee, his executors, administrators, or assigns, then the lessee, his executors, administrators, or assigns, shall, when and so soon as the same shall cease to be used by him or them, transfer and deliver up to the lessors, their heirs and assigns, such of the aforesaid things as shall be so required, in as good a state and condition as the same shall be in at the time of giving such notice, subsequent and reasonable wear and tear only excepted, the lessors, their heirs and assigns, paying for the purchase thereof, at a valuation to be made by two arbitrators or their umpire, to be applied as hereinafter mentioned. Provided always, that in case all or any of the aforesaid rents or royalties respectively hereinbefore received and made payable shall be unpaid, in part or in the whole, for the space of twenty-one days next after the same shall become due respectively, then and in every such case it shall be lawful for the lessors, their heirs and assigns, or their agent, to enter upon any of the lands which shall have been entered upon by the lessee, his executors, administrators, and assigns, and distrain all the coal then gotten, and also the horses, carts, carriages, engines, machinery, implements, tackle, and materials, used and employed in and about the said mine and works, and the distress and distresses then and there found, to take, lead, and carry away, and to sell and dispose of the same in like manner as in cases of distresses for rent reserved in common leases for years, and out of the money arising by such sale (if any) to retain and take all arrears of the said rents and royalties, and also the costs and charges of making and keeping such distresses, and of the sale thereof, rendering the overplus (if any) unto the lessee, his executors, administrators, and assigns. Provided also, and these presents are upon this express con-

dition, that in case all or any of the rents or royalties hereinbefore reserved or made payable shall be unpaid, in part or in whole, by the space of twenty-eight days next after the same shall become payable, and the same shall be demanded on the expiration of these days, or at any time afterwards, and shall not be paid at the time of such demand, or in case the lessee, his executors, administrators, or assigns, shall not perform and keep the several covenants hereinbefore contained, or in case he or they shall be found or declared bankrupt, or shall make any composition with his or their creditors, or shall either voluntarily or involuntarily do, or suffer to be done, any act, matter, or thing, whereby or in consequence whereof this present lease or the interest of the lessee, his executors, administrators, or assigns in the premises hereby demised, shall become vested in any person or persons whomsoever, except by bequest or representation as executors or administrators, without such consent as aforesaid, then and in any of the said cases, it shall be lawful for the lessors, their heirs, and assigns, to enter into and upon and retain possession of the said demised premises, together with all engines, tools, machinery, and other working gear, coal, and other materials, then being on the said demised premises for their absolute use and benefit, without making any compensation whatsoever for the same, anything heretofore contained to the contrary thereof notwithstanding. And it is hereby expressly directed that the lessors, their heirs and assigns, and their lessees and tenants may bore, sink to, and search for, work, get, demise, lease, sell, or otherwise dispose of every or any mine coal or other mineral substances, stone, clay, and valuable earth, other than the bed or seam of coal hereby demised, and the stone, brick, clay, sand, and other materials which the lessee, his executors, administrators, or assigns is or are hereinbefore authorised to get. And may exercise and grant any powers for searching, for working, ventilating, draining, getting, raising, banking, carrying away, selling, and disposing of such other mines, mineral substances, stone, clay, and valuable earth, in, from, upon, over, and through the said lands, and every part thereof or any other lands. *Provided also* that if at any time during the continuance or after the determination of this present demise any dispute, doubt, or question shall arise between the lessors, their heirs and assigns, and the lessee, his executors, administrators, and assigns, or any of them, either respecting any matter or thing whatsoever arising out of or connected with this present demise, or any of the covenants, stipulations, and provisions herein contained, then every such dispute, doubt, or question shall be referred

CHAP. I.

Forfeiture.

Reservation of other mines, &c., to lessor.

Arbitration clause.

CHAP. I.

Trustees to
apply money as
directed by
Court.

to two arbitrators or their umpire pursuant to, and so as with regard to the mode and consequence of the reference, and in all respects to conform to the provisions in that behalf contained in the Common Law Procedure Act, 1854, or any then subsisting statutory modification thereof. And upon every or any such reference, the arbitrators and umpire shall respectively have power to examine the parties and witnesses upon oath or affirmation, and either to fix, settle, and determine the amount of costs of the reference and award respectively or incidental thereto, to be paid by both parties, or either party, and to direct the same to be taxed either as between solicitor and client or otherwise, and to direct and award when and by and to whom such costs shall be paid. Provided always and the said AB and CD do hereby expressly declare that they the said AB and CD will apply the moneys to be received under or by virtue of these presents, in such manner as the Court of Chancery shall from time to time direct. In witness, &c.

8. *Lease of Mines.*

This indenture, made the day of A.D. , between EC of the one part, and CM of of the other part,

Witnesseth that, in consideration of the rents and royalties hereinafter reserved, and the covenants hereinafter contained, and on the part of the said CM, his executors, administrators, and assigns, to be observed and performed, he, the said EC, doth hereby lease unto the said CM, his executors, administrators, and assigns,

Parcels.

All the mines, layers, veins, seams, beds, and strata of coal, blackband, ironstone, and fire-clay from the bottom stone of the red vein of coal to the surface, within or under all that tract of land situate in the county of Carmarthen, containing acres or thereabouts, which said tract of land is marked out by boundary stones, and is, with the abutments and boundaries thereof, delineated in the map or place annexed to these presents, and therein coloured ;

Right of way.

Together with all ways and way leaves, and liberty to the said CM, his executors, administrators, and assigns, to lay, make, and repair roads, tramways, railroads, waggon-ways, and other ways in, across, and along the said tract of land hereinbefore described, or any part thereof. And also full and free liberty to search, seek, bore, dig, drive, sink for, win, work, get, and raise the said coal, blackband, ironstone, and fireclay, and to carry away the same, and to make pits, shafts, pit-rooms and heap-rooms, drifts, levels, and watercourses, and

Power to dig
coal.

to erect and use steam and other engines, and to alter, change, and pull down and carry away the same, or any of the materials thereof, at his and their free will and pleasure, and generally to do all such other works, acts, and things, either now in use or hereafter to be invented, as may be necessary or convenient for the full and complete enjoyment thereof, he the said CM, his executors, administrators, and assigns, making full satisfaction to all persons legally entitled thereto for the damage and spoil of ground occasioned by the searching for or working the said coal, blackband, ironstone, and fireclay, or the laying, making or repairing roads, tramways, railroads, waggon-ways, or other ways, or by leading and carrying away the coal, blackband, ironstone, fireclay, and other things to be gotten, or by making pits, shafts, pit-rooms and heap-rooms, drifts, levels, and watercourses, or erecting and using steam or other engines, or by exercising the liberties and powers assigned to the person or persons who shall be in possession of such ground at the time or times such spoil or damage shall be done. Excepting and reserving unto the said EC, his heirs and assigns, and his and their agents, servants, and workmen full and free liberty, at all convenient times, to enter upon the said demised premises, or any part or parts thereof, and view the state thereof, and to inspect, examine, and measure the said mines and workings, and any pits and shafts which may be made or sunk by the said CM, his executors, administrators, and assigns, and for the purposes aforesaid, to use the tackle, machinery, ropes, buckets, and other conveniences within the said works, or belonging or appertaining thereto, as often as he or they shall think proper. *To have and to hold* the said coal, blackband, ironstone, and fireclay, and the said liberties, powers, and authorities, and all and singular other the premises hereby leased, or expressed so to be, unto the said CM, his executors, administrators, and assigns, from the day of , for the term of years thence next ensuing.

Yielding and paying therefor, during the said term, for every acre of the surface of land hereinbefore described, which shall from time to time be entered upon and used and occupied by the said CM, his executors, administrators, or assigns, in exercise of any of the liberties, powers, and authorities hereinbefore granted, the yearly rent of £ , and so in proportion for a less quantity than an acre, by four equal payments in each year, on the day of , the day of , the day of , the first payment thereof to be made on the first of the said days of payment which shall happen

Reddendum.

CHAP. I

next after the said lands shall be so entered upon, used, and occupied by the said CM, his executors, administrators, and assigns as aforesaid, the said rent to continue payable during all the then residue of the said term, whether the said lands shall continue to be used and occupied by him or them, or not.

And also yielding and paying, in each and every year during the said term, the several royalties or duty rents therein-after mentioned (that is to say), the sum of 8d. for every ton of 2520 lbs. avoirdupois weight of blackband, and 9d. for every ton of 2520 lbs. avoirdupois weight of ironstone, and 6d. for every ton of 2352 lbs. avoirdupois weight of fireclay, and 9d. for every ton of 2352 lbs. avoirdupois weight of all coal raised and gotten from within or upon the said tract of land hereinbefore described.

But if it shall happen that the said royalties or duty rents on the quantity of the said blackband, ironstone, fireclay, and coal hereinafter called, the said mineral substances which shall be raised or gotten from the aforesaid land during the first year of the said term shall not amount in the whole to the sum of £ , then no royalty or duty rent shall be payable for the first year of the said term.

But if the said royalties or duty rents on the quantity of the said mineral substances which shall be raised or gotten from the aforesaid land during the first year of the said term shall exceed the sum of £ , then the sum by which such royalties or duty rents shall exceed the sum of £ shall be paid by the said CM, his executors, administrators, or assigns, to the said EC, his heirs or assigns.

And if the said royalties or duty rents on the quantity of the said mineral substances raised or gotten as aforesaid, during the second year of the said term, shall not amount in the whole to the sum of £ , then a rent or sum of £ shall be paid by the said CM, his executors, administrators, or assigns, and shall be accepted in full for all royalty or duty rents for such second year.

And if such royalties or duty rents on the quantity of the said mineral substances raised or gotten as aforesaid during the third and every subsequent year of the said term shall not amount in the whole to the sum of £ , then a rent or sum of £ shall be paid by the said CM, his executors, administrators, and assigns, and shall be accepted in full for all royalty or duty rent during the said third and every subsequent year.

And also yielding and paying a royalty or duty rent of 1d. per ton of 2352 lbs. avoirdupois weight for all coal, ironstone,

fireclay, and other minerals carried from other mines or works belonging to or carried on by the said CM, his executors, or administrators, in, through, over, or upon the said tract of land hereinbefore described.

The said several royalties or duty rents to be paid by equal quarterly payments on the day of , the day of , the day of , and the day of in every year, it being, however, expressly agreed and declared that the reservation of royalties and duty rents hereinbefore contained shall not in anywise limit or abridge the right of the said EC, his heirs and assigns, under the reservation hereinbefore contained to the full royalties or duty rents of 8d. per ton for blackband, 9d. per ton for ironstone, 6d. per ton for fireclay, and 9d. per ton for coal which may be respectively raised and gotten as aforesaid.

Provided always, and it is hereby agreed and declared that on the day of A.D. , and on the day of in every succeeding year of the said term, account shall be taken of the said mineral substances which shall have been raised and gotten by the said CM, his executors, administrators, or assigns, during the last preceding seven years. And if, upon the taking of such accounts, it shall appear that the said CM, his executors, administrators, or assigns hath or have in any period of seven years raised and gotten a quantity of the said mineral substances hereby demised, exceeding the quantity which, after the said rates of 8d. per ton, 9d. per ton, 6d. per ton, and 9d. per ton respectively, as aforesaid, would amount in any year or years of the said period of seven years to a larger sum than the minimum royalty hereinbefore respectively reserved, as aforesaid, for that year or years; and if it shall appear, as aforesaid, that in any year or years of the same period of seven years the said CM, his executors, administrators, or assigns hath or have raised and gotten a quantity of mineral substances less than the quantity which after the rates aforesaid would amount to a less sum than the minimum royalty hereinbefore respectively reserved for such last-mentioned year or years, then and in every such case the surplus quantity gotten in every such year or years of the same period of seven years, or so much thereof as shall be necessary to make up the minimum royalty, shall be added to the less quantity or quantities gotten in any other year or years of the same period respectively, so as to make up the deficiency, and no payment of royalty shall be made for the surplus quantity applied in making up such deficiency; but so that no excess

CHAP. I.

of royalty paid in any preceding year or years of the said period shall be allowed in making up a deficiency in any succeeding year or years of the same period.

Provided also that in case the said CM, his executors, administrators, or assigns, shall at any time during the said term erect upon the said land hereinbefore described an engine or engines to be used for the better working and getting of the said mineral substances, or any of them, an allowance shall be made to the said CM, his executors, administrators, or assigns, from the time at which such engine or engines shall commence working of such quantity of coal as may be necessary for the use and supply of the said engine or engines, provided such quantity shall not exceed in any one year one-twelfth part of the quantity of coal raised during each such year, and no royalty or duty rent shall be payable upon the quantity of coal so used.

And the said CM doth hereby for himself, his trustees, executors, administrators, and assigns, covenant with the said EC, his heirs and assigns, in manner following (that is to say), that he, the said CM, his executors, administrators, or assigns, will pay the said several rents and royalties hereinbefore reserved and made payable, as aforesaid, on the days, at the times, and in the proportions and manner hereinbefore mentioned and appointed.

And further, that he, the said CM, his executors, administrators, and assigns, will from time to time, and at all times during the said term, pay all taxes, tithes, assessments, and impositions whatsoever, parochial, parliamentary, or otherwise, now imposed, or hereafter to be imposed, in respect of the said premises, or upon the several rents, royalties, or upon the works to be carried on in pursuance of these presents, or upon the lessor or tenant in respect thereof (except the landlord's property-tax), and will keep the said EC, his heirs, executors, administrators, and assigns indemnified therefrom.

And will search for and dig the said mineral substances in proper and likely places within, under, and upon the said tract of land, and will, with a sufficient number of good and able-bodied workmen; fairly and efficiently work and carry on all the mines and works for the time being opened upon the said premises, according to the best improved system of working mines of a similar nature, and to the satisfaction of the said EC, his heirs or assigns.

And shall and will work the headings and stalls when the same shall respectively be opened in the seams, beds, or mines within the said land of such widths as shall be approved of by the said EC, his heirs or assigns, or his or their mineral agent or surveyor.

And shall and will leave unwrought in each and every seam of the said mineral substances, walls, or pillars of such mineral substances for the support of the roofs thereof of such dimensions as shall be approved by the said EC, his heirs, or assigns, or his or their mineral surveyor or agent in writing, under his or their hand or hands, and will not work, lessen, reduce, or take away the said walls or pillars, or any part of them, without the license or consent of the said EC, his heirs or assigns, in writing first obtained.

And will not work the mines and seams of any of the said mineral substances nearer to the surface of the said tract of land hereinbefore described than shall be approved of by the said EC, his heirs or assigns, or his or their mineral surveyor or agent, such approval to be signified in writing under his or their hand or hands. And also shall not, nor will at any time during the continuance of this demise, without the consent in writing of the said EC, his heirs or assigns, grant or permit or suffer any person or persons whomsoever to make or use any drift, outstroke, water-gate, or air-course, or other communication whatsoever into the said mines and premises from any adjoining or other mines not worked by the said CM, his heirs, executors, or administrators. And will not carry, or permit or suffer to be carried, any mineral substances in, through, over, or upon the said tract of land hereinbefore described other than and except such mineral substances as may be got or worked from or out of any mines or works belonging to or carried on by the said CM, his executors, or administrators.

And also shall and will, during the said term, keep the said mines and premises effectually drained from all water.

And also will not do or suffer anything whereby the said mines and premises shall or may be damnified, drowned, or over-burdened with waste, foul air, or slyth, or which may occasion any loss of coal that may be wrought to profit, or occasion any thrust (a) or creep (b) upon the same, or which may tend to hinder, stop, or obstruct the water-courses, air-courses, passages, or drifts belonging to the said mines and premises, but shall keep the same open, free, clear, and in good repair and condition. And also shall and will from time to time set up and maintain, during the said term, in each of the several levels in the seams, beds, or veins of the said mineral substances, good and substantial boundary

- (a) "*Thrust*," is a sinking.
 (b) "*Creep*" is the sinking of the columns of coal left for the support of the roof of the mine, accompanied by a rising of the floor or "pavement," and caused either by the smallness of the columns or the softness of the pavement.

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posts, or stones, accurately defining the boundaries of the said mineral substances.

And also shall and will, during the said term hereby granted, keep accurate and correct plans and accounts of the workings of the said mines and premises, and of the mineral substances won or raised therefrom.

And shall and will permit and suffer the said EC, his heirs and assigns, and his or their agent or agents, from time to time, and at all reasonable times during the said term to have free access to examine and inspect the said plans and accounts, and to take copies of the same or of any part thereof, and that he, the said CM, his executors, administrators, or assigns, will, on the day of , and the day of in every year, and also on the determination or expiration of the term hereby granted, deliver to the said EC, his heirs or assigns, or his or their agent, for the time being, true and fair accounts in writing containing the quantity and weight of all the mineral substances which during the preceding half-year shall have been worked, gotten, or raised under or by virtue of these presents, and of the quantity of coal used for any engine or engines which may be erected as aforesaid, and will verify such accounts from time to time in writing under the hand or hands of the said CM, his executors, administrators, or assigns, or his or their chief or only agent.

And will, on the day of , in every year, and on the expiration or determination of the said term hereby granted, deliver to the said EC, his heirs or assigns, or his or their agents, a true copy of every such plan as aforesaid.

And will at the end or other sooner determination of the said term give up to the said EC, his heirs or assigns, the said plans, or true and authenticated copies thereof, in good and perfect condition.

And also that all waggons and other carriages, corves, boxes, or tubs respectively used by the said CM, his executors, administrators, or assigns, in drawing out or carrying away the said mineral substances hereby demised, shall respectively be of the same (and that a certain and known) size or gauge, and shall not be altered unless two calendar months' notice in writing be given to the said EC, his heirs or assigns, or his or their agent, of the intended alteration, and such alteration shall be made only at the end of such two calendar months. And also that when and so often as the said EC, his heirs and assigns shall think fit such waggons, carriages, corves, boxes, or tubs may be gauged or measured at the said works by him or them, or his or their agent or agents, and if the same or any of them shall be found capable of containing

more mineral substances than the acknowledged and specified quantity they shall be considered and deemed to have carried such over-measure for two calendar months next preceding such measuring thereof, and such quantity or measure shall be accounted for accordingly unless the same shall have been gauged or measured within the space of two calendar months previously, and then only from the time of such last previous measurement. And also shall and will at any time or times during the said term permit and suffer the said EC, his heirs or assigns, and his and their agent or agents, servants, and workmen, during the continuance of this present lease, to descend into the said mines by any pit or pits used for the working thereof, whether within the limits aforesaid or not, to view and examine the workings of the said mines, and to measure and take plans of the same respectively, and to adopt any other proper means to ascertain the real state or condition of the said works and premises, and in so doing to use all or any of the horses, engines, machinery, and apparatus (whether within the limits aforesaid or not) used in connection with the said works, and to have the assistance of any of the agents, workmen, and servants employed in the said works without making or paying compensation for such use and assistance.

And also in like manner conveniently to ascend and return from the said works (such person or persons so descending and returning intercepting as little as may be the carrying on of the said works). And also will at the end or other sooner determination of the said term hereby granted peaceably and quietly deliver up the works and premises in good and sufficient repair, state, and condition in all things.

And will at the end or sooner determination of the said term hereby granted, if required, by notice in writing to be given to the said CM, his executors, administrators, or assigns, or left for him or them at the counting-house or office on the said demised premises twelve calendar months previously to the expiration of the said term, or other sooner determination thereof, if such determination does not arise by virtue of the proviso for re-entry hereinafter contained, deliver up to the said EC, his heirs or assigns, possession of any machinery, rails, tramroads, or other apparatus then standing upon or within the land to which the present lease or grant extends, or such part of the said machinery, rails, tramroads, or other apparatus as may be specified in such notice, on being paid for the same at a valuation to be made by two arbitrators or their umpire, to be appointed as hereinafter mentioned.

And that the said CM, his executors, administrators, and

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assigns shall and will, from time to time, and at all times during the said term, make reasonable and fair satisfaction and compensation to every person whomsoever legally entitled thereto on account of any injury or damage which may be sustained by him or her in consequence of the said works, or in the execution of the powers and authorities hereinbefore granted. And will keep indemnified the said EC, his heirs and assigns, from and against all actions, costs, damages, and expenses, by reason of any such injury or damage, or by reason of the breach of any of the covenants on the part of the said CM, his executors, administrators, and assigns herein contained, or in anywise relating thereto.

And also will not at any time assign or underlet or otherwise part with the said premises or any part thereof for the whole or any part of the term hereby granted without the consent in writing of the said EC, his heirs or assigns, first had and obtained.

Provided always that in case all or any of the aforesaid rents or royalties respectively hereinbefore reserved and made payable shall be unpaid in part or in the whole for the space of twenty-one days next after the same shall become due respectively, then and in every such case it shall be left for the said EC, his heirs or assigns, or his or their agents, to stop and hinder the loading or sending away of any of the mineral substances from off the said premises, and also to enter upon and distrain all and every or any of the mineral substances, and also the horses, carts, carriages, engines, machinery, implements, tackle, and materials used and employed in and about the said works and premises, and also all goods, chattels, and effects whatsoever in or upon the said lands, hereditaments, and premises, and the distress and distresses then and there found, to take, lead, and carry away, and to sell and dispose of the same in like manner, as in cases of distresses for rent reserved in common leases for years, and out of the money arising by such sale (if any) to retain and take all arrears of the said rents and royalties, and also the costs and charges of making and keeping such distresses, and of the sale thereof rendering the overplus (if any) unto the said CM, his executors, administrators, or assigns.

Provided also, and these presents are upon this express condition, that in case all or any of the rents or royalties hereinbefore reserved or made payable shall be unpaid in part or in whole by the space of thirty days next after the same shall become payable, and the same shall be demanded on the expiration of these days, or any time afterwards, and shall not be paid at the time of such demand, or in case the said CM,

his executors, administrators, and assigns shall not perform and keep the several covenants hereinbefore contained, or in case he or they shall be found or declared bankrupt, whether any declaration or adjudication in bankruptcy shall be afterwards superseded or annulled, or not, or shall either voluntarily or involuntarily do or suffer to be done any act, matter, or thing whereby or in consequence whereof this present lease or the instrument of the said CM, his executors, administrators, or assigns, in the premises hereby demised, shall become vested in any person or persons whomsoever, except by bequest or representation, as executors or administrators without such consent as aforesaid, then and in any of the said cases it shall be lawful for the said EC, his heirs or assigns, to enter into and upon and retain possession of the said premises, together with all engines, tools, machinery, and other working gear and mineral substances and other matters, then being on the said premises, for his and their absolute use and benefit, without making any compensation whatsoever for the same, anything hereinbefore contained to the contrary notwithstanding.

And it is hereby agreed that in case any re-entry shall be made under the proviso lastly hereinbefore contained, there shall be payable by the said CM, his executors, administrators, and assigns, in addition to the rent or royalty then due in respect of the said premises, a proportionate part of the accruing rent or royalty for the then current quarter of a year from the last quarterly day for payment up to the day on which such re-entry shall be made.

And the said EC doth hereby for himself, his heirs, executors, and administrators covenant with the said CM, his executors, administrators, and assigns.

That it shall be lawful for the said CM, his executors, administrators, and assigns, at all times during the said terms of sixty years (determinable as hereinafter is mentioned), quietly to hold and enjoy the premises hereby demised, or intended so to be, without any interference by the said EC, his heirs or assigns, or any person or persons lawfully or equitably claiming through, under, or in trust for him or them.

And further, that he, the said CM, his executors, administrators, or assigns, at any time or times within the space of six calendar months after the expiration or other determination of the said term (except the same shall be determined by re-entry made by the said EC, his heirs or assigns, under the proviso lastly hereinbefore contained, the said CM, his executors, administrators, or assigns having first paid and dis-

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charged the several rents and royalties which shall by virtue of these presents be payable, and having observed and performed all and singular the covenants and conditions on his or their parts hereinbefore contained), may take away, have, and enjoy all such mineral substances as shall at or before the expiration or other determination of the said term have been gotten from the said premises.

And also within such space of time may use and repair all ways and roads which may be necessary or requisite for the removal of such mineral substances, and may take away for his and their own use all such other erections as shall not be built of stone or brick (although the same may be roofed with slate or tile), and all steam and other engines, machinery, and tackle, and all battens or rollers and stoppings of wood, or stone-work, air-tubes, and air-furnaces, as he, the said CM, his executors, administrators, or assigns, may have constructed or built upon the said premises during the continuance of the said term, and shall not be taken by the said EC, his heirs or assigns, at a valuation under the provision for that purpose hereinbefore contained.

Provided always that in case the said CM, his executors, administrators, or assigns shall be desirous of putting an end to the term hereby granted at the expiration of the first fifth, and every subsequent fifth year thereof, and shall give unto the said EC, his heirs or assigns, not less than twelve calendar months' notice in writing previous to the end of any such fifth year thereof, and shall at or before the expiration of such fifth year duly pay the several rents and royalties hereby reserved and made payable, and perform and fulfil the several covenants herein contained, and on his and their parts covenanted to be performed and fulfilled, then and in such case at the end of such fifth year of the said term hereby granted, this present lease shall absolutely cease and determine.

Provided also that if at any time during the continuance or after the determination of this present lease, any dispute, doubt, or question shall arise between the said EC, his heirs or assigns, and the said CM, his executors, administrators, or assigns, or any of them, either respecting any matter or thing whatsoever arising out of or connected with this present lease, or any of the covenants, stipulations, and provisions herein contained, then every such dispute, doubt, or question shall be referred to two arbitrators, or their umpire pursuant to, and so as with regard to the mode and consequence of the reference, and in all other respects to conform to the provisions in that behalf contained in the Common Law

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Procedure Act, 1854, or any then subsisting statutory modification thereof.

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And upon every or any such reference, the arbitrators and umpire shall respectively have power to examine the parties and witnesses upon oath or affirmation, and either to fix, settle, and determine the amount of costs of the reference, and award respectively or incidental thereto, to be paid by both parties or either party, or to direct the same to be taxed either as between solicitor and client or otherwise, and to direct and award when and by and to whom such costs shall be paid. In witness, &c.

9. Lease of a Mansion House. In exercise of a power.

This indenture, made the day of 18 , between AF of the first part, and VFB of the second part, and T of the third part,

Witnesseth that, in consideration of the rent hereinafter reserved, and of the covenants by the said T hereinafter contained, and in exercise of a power contained in the will of JB deceased, dated the day of , and of every power enabling him in that behalf. He, the said AF, with the consent in writing of the said VFB, testified by his being made a party to and executing these presents, doth by this present deed or instrument in writing, sealed and delivered by him, the said AF, in the presence of and attested by the two credible persons whose names are intended to be endorsed hereupon as witnesses to the sealing and delivery of these presents, limit and appoint by way of (c) demise and lease unto the said T, his executors, administrators, and assigns, all that mansion-house, &c. (parcels). Together with all rights, easements, fixtures, and appurtenants thereto belonging or usually occupied or enjoyed therewith. *To have and to hold* the premises hereinbefore expressed to be hereby demised unto the said T, his executors, administrators, and assigns, for the term of years (d) from the day of 18 , determinable nevertheless as hereinafter mentioned, yielding and paying therefor during the said term the yearly rent of £ by equal quarterly payments, on the day of the day of the day of and the day of in each year, the first quarterly payment to be

Parcels.

Habendum.

Reddendum.

(c) As to the operative words of a lease see *ante* p. 42.

(d) As to the commencement of terms see *ante* p. 63.

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Proportionate part in the event of re-entry.	and also yielding and paying, in the event of and immediately upon the said term being determined by re-entry, under the provision hereinafter contained, a proportionate part of the said rent for the fraction of the current quarter of a year up to the time of such re-entry. And the said T doth hereby for himself, his heirs, executors, and administrators, covenant with the said AF, his heirs and assigns, in the manner following (that is to say), that he, the said T, his executors, administrators, or assigns, will pay the said rent hereinbefore reserved, and made payable as aforesaid on the days, at the times, and in manner hereinbefore mentioned. And also will, during the continuance of the said term, pay all the tithe, or rentcharge in lieu of tithes and land tax, and all rates, taxes, charges, and assessments whatsoever now imposed, or hereinafter to be imposed, in respect of the said premises hereby demised, or upon the lessor or tenant in respect thereof, except the landlord's property tax. And also will throughout the said term, at his and their own expense, without being thereunto required, well and sufficiently repair, maintain, and keep the said premises, and all the gates, stiles, bars, pales, posts, rails, hedges, ditches, drains, wells, banks, watercourses, grips, and fences thereto belonging, in good and substantial repair and condition (e).
Covenants by lessee.	
Taxes.	
Repair.	
Paint.	And particularly will paint, with two coats of good oil colour, and in a workmanlike manner, in every third year of the said term, all the outside wood, iron, and other work previously or usually painted. And also will, during the said term, keep the said garden and pleasure-grounds belonging to the said mansion-house well stocked, cropped, and manured, and in proper order and condition, and in all respects properly cultivate and manage the same. And also will permit the said AF, his heirs and assigns, and all persons authorised by him or them, twice in every year, or oftener during the said term, at all reasonable hours, to enter into the said premises to view the condition thereof, and to give or leave notice in writing upon the said premises to or for the said T, his executors, administrators, and assigns, of all defects and wants of repair then found ; and also will, within calendar months after every such notice, well and sufficiently repair and make good such defects and wants of repair, whereof notice
Keep garden in good order.	
Permit lessor to enter and inspect.	
Repair upon three months' notice.	

(e) Notwithstanding the covenant the case of fire. *Leeds v. Chatham*,
to insure, the tenant will, under 1 Sim. 146; *Lofft v. Davis*, 1 E. &
this covenant, be liable to repair in E., 474.

shall have been so given or left. And also will, throughout the said term (*f*), at his and their expense, keep the said mansion-house, and all other the buildings on the said premises hereby demised, including the fixtures, insured in the joint names of the said AF, his heirs and assigns, and of the said T, his executors, administrators, and assigns, against loss or damage by fire, in the insurance office, or some other responsible insurance office in London or Westminster, to be approved by the said AF, his heirs or assigns, for a sum not less than £ . And also will, when thereunto required (*g*), produce to the said AF, his heirs or assigns, or his or their agents, the policy or policies of insurance, and the receipts for the premium, and other sums payable for effecting and keeping on foot the said insurance. And also will lay out all the moneys which shall (*h*) be received under or by virtue of any such policies respectively, in rebuilding, reinstating, replacing, or repairing the premises, or such part thereof, as shall have been destroyed or damaged by fire. And if the same moneys shall be insufficient for the purpose, will provide out of his or their own moneys such further sums as may be required, and will, with all convenient speed, expend the same for the purpose aforesaid. And also will not use or suffer the said messuage or premises, or any part thereof, to be used for a school or boarding-house, or for any trade or business, or otherwise, than as a private dwelling-house only, without the previous license in writing of the said AF, his heirs or assigns. And also will not, until the previous license of the said AF, his heirs or assigns, assign, underlet, or part with the possession of the said premises, or any part thereof. And will, at the expiration or sooner determination of the said term, peaceably and quietly, deliver up to the said AF, his heirs or assigns, the said premises hereby demised, in good and sufficient repair and condition in all things. Provided always, and these presents are upon this express condition, that in case the rent hereinbefore reserved or made payable shall be unpaid, in part or in whole, by the space of thirty days next after the same shall become payable, and the same

Produce policies and receipts.

Lay out insurance moneys in building premises.

Use premises as a private house.

Will not assign.

Deliver up premises at end of term.

Provision for re-entry.

(*f*) This covenant should not be omitted, as if it is, the landlord in an action on the covenant will be unable to prove the breach. See *Doe d. Bridges v. Whitehead* 8 Ad. & Ell. 571.

(*g*) By 22 & 23 Vict. c. 35, s. 4, a court of equity has power to grant relief against a forfeiture for breach of this covenant, even if the covenant is contained in a lease dated

prior to this Act, if the breach has been committed after the date of the Act. See *Page v. Bennett*, 2 Giff. 117. As to action of ejectment, see 23 & 24 Vict. c. 126, s. 2.

(*h*) The insertion of this covenant makes the covenant to insure run with the land. See *Vernon v. Smith*, 5 B. & A. 1.

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Covenant by
lessor for quiet
enjoyment.

Power to either
party to deter-
mine lease.

shall be demanded on the expiration of these days, or any time afterwards, and shall not be paid at the time of such demand, or in case the said T, his executors, administrators, or assigns, shall not observe and perform all and every, or any of the covenants herein contained, and on his and their part to be observed and performed, then, and in any of such cases, it shall be lawful for the said AF, his heirs or assigns, into all and singular the premises hereby demised, or into any part thereof in the name of the whole, to re-enter, and the same to have again, repossess, and enjoy as in his and their first and former estate, anything hereinafter contained to the contrary notwithstanding. And the said VFB doth hereby, for himself, his heirs, executors, and administrators, covenant with the said T, his executors, administrators, and assigns, that it shall be lawful for the said T, his executors, administrators, and assigns, at all times during the said term of twenty years (determinable as hereinafter mentioned), quietly to hold and enjoy all and every the premises hereby demised, or intended so to be, without any lawful interruption or disturbance of or by the said VFB, or the said AF, their respective heirs or assigns, or any person or persons, lawfully or equitably, claiming through, under, or in trust, for them, or any of them. Provided always, that in case the said T, his executors, administrators, or assigns, shall be desirous of putting an end to the terms hereby granted at the expiration of the first ten or fifteen years thereof, and shall give unto the said AF, his heirs and assigns, or shall leave a notice at his or their usual or last known place of abode in England, not less than twelve calendar months' previous notice of his or their intention so to do, and shall pay, or cause to be paid, all arrears of rent, and perform all and every the covenants hereinbefore contained, and on his and their part to be performed, or if the said AF, his heirs or assigns, shall be desirous of putting an end to the terms thereby granted at the expiration of the first ten years, or fifteen years thereof, and shall give to the said T, his executors, administrators, or assigns, or shall leave at, or on, some part of the mansion-house thereby demised, not less than twelve calendar months' previous notice of his and their intention so to do. Then and in either of the said cases immediately after the expiration of the said term of ten years, or fifteen years, as the case may be, this present demise shall absolutely cease and determine. In witness, &c.

10. *Surrender of a Lease (the Lessor being a person of unsound mind).*

This indenture, made the day of 18 , between the said and , now or lately carrying on the business of copper rollers at , called the Copper Mills, at , in the county of , under the style and firm of JF & Co., of the one part, and EP, a person of unsound mind, and FP, the committee of the said EP, of the other part. Whereas, by an indenture of lease, dated the day of 18 , and expressed to be made between of the one part, and JB of the other part, all those iron mills or plate mills commonly called Mills, with the dwelling-houses, shop, and garden thereto belonging, situated within the manor and parish of , in the county of , then in the occupation of or his under-tenants, with the appurtenances (excepting timber, mines, and royalty of fishing), were demised by the said unto the said JB, his executors, administrators, and assigns from the day of the date of the indenture now being recited, for the full term of four score and nineteen years, if since deceased, HB, and JB since deceased, or any or either of them should so long live, subject to the yearly rent of £ , and to the covenants and conditions therein mentioned. And whereas the said lease was granted to the said JB as a trustee for the said JF & Company. And whereas the said lease is still subsisting upon the life of the said HB. And whereas the said JF & Company, many years since, converted the said iron mills into copper mills for rolling or plating copper, and substituted machinery adapted to the latter in place of that adapted to the former business. And whereas the said JF & Company have retired from business, and closed the said mills, the said and have agreed to surrender the said lease, and give up possession of the said leasehold premises and the machinery, articles, and things in or upon the same, with the appurtenances (except the several articles and things and their appurtenances mentioned in the schedule hereto), unto the said EP, acting by the said FP, as such committee as aforesaid, and to pay to him, the said FP, as such committee as aforesaid, the sum of £100 in lieu and full satisfaction of all claims for repairs and dilapidations in or upon the said premises. Now this Indenture witnesseth that, in pursuance and performance of the said agreement, and in consideration of the premises, they the said and do and each of them hereby doth surrender and assign unto the said EP,

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acting by the said FP as such committee as aforesaid, All those copper mills and plate mills commonly called Mills, and all other the premises comprised in and demised by the hereinbefore recited indenture of lease, together with the appurtenances thereto belonging, and the machinery, articles, and things in and upon the same (except the several articles and things, and their appurtenances mentioned in the schedule hereto), to the intent that the estate, term, right, title, and interest of them, the said and , and every of them in the same premises may be absolutely merged and extinguished. And the said and do hereby jointly for themselves, their heirs, executors, and administrators, and each of them, doth hereby separately for himself, his heirs, executors, and administrators, covenant with the said , his heirs and assigns in manner following:—*Good right to surrender; free from incumbrances; further assurances.* In witness, &c.

*The Schedule.*II. *Assignment of Leasehold Property.*

This indenture, made the day of 18 , between AB of the one part and CD of the other part. Whereas, by an indenture of lease dated the day of 18 , and expressed to be made between AGF of the one part and WST of the other part, all that messuage or tenement, with outbuildings and appurtenances, being , was demised by the said AGF unto the said WST, his executors, administrators, and assigns from the 24th day of March 18 for the term of thirty-two years at the rent of £ , and under, and subject to the covenants, conditions, and agreements by and in the said indenture of lease respectively reserved and contained. And whereas by divers mesne assignments and acts in the law, and ultimately by an indenture, dated, &c., and expressed, &c., [*parties.*] The said messuage or tenements and premises, comprised in the hereinbefore-mentioned indenture of lease, became vested in the said AB for all the residue of the said term of thirty-two years. And whereas the said CD hath agreed with the said AB for the purchase of the said messuage or tenement and premises demised by the said indenture of lease for the residue now unexpired of the said term of thirty-two years, and the tenant's fixtures there, at or for the price of £ . Now this indenture witnesseth that, in pursuance and performance of the said agreements, and in

consideration of the said sum of £ , on or before the execution of these presents, paid by the said CD to the said AB (*the receipt, &c.*), he, the said AB, doth hereby assign unto the said CD, his executors, administrators, and assigns, All that messuage or tenement with the outstanding buildings and appurtenances, and all and singular other the premises by the hereinbefore recited indenture of lease expressed to be demised, with their appurtenances and all the tenant's fixtures in and about the said messuage or tenement and premises, and all the estate, right, title, interest, term and terms of years yet to come and unexpired, claim and demand, both at law and in equity of him the said AB, in to, out of, or upon the said messuage, tenement, and premises hereby assigned or intended so to be, and every part and parcel thereof. *To have and to hold* the said messuage and tenement, and all and singular other the premises hereby assigned or intended to be, with their and every of their appurtenances, unto the said CD, his executors, administrators, and assigns, henceforth for the residue of the said term of thirty-two years, at the rent and under and subject to the covenants and conditions by and in the hereinbefore recited indenture of lease reserved, contained, and henceforth on the part of the lessee to be paid, observed, and performed; And *to have and to hold* the said tenant's fixtures hereby assigned or intended so to be unto the said CD, his executors, administrators, and assigns absolutely. And the said AB doth hereby for himself, his executors and administrators, covenant with the said CD, his executors, administrators, and assigns, in manner following:— (That is to say), that for or notwithstanding anything whatsoever by the said AB done, or knowingly suffered, the hereinbefore-recited indenture of lease is now a good and effectual lease in the law of the said premises therein comprised, and that the same is now in full force, and in nowise become void or voidable; and notwithstanding any such thing as aforesaid, all and singular the rents, covenants, and conditions in and by the same indenture of lease reserved and contained, and on the part of the lessee therein named, his executors, administrators, and assigns, to be paid, observed, and performed, have been paid, observed, and performed up to the day of . And that notwithstanding any such thing as aforesaid, he, the said AB, now hath full power to assign the said premises hereby assigned or intended so to be unto the said CD, his executors, administrators, or assigns, in manner aforesaid. And also that it shall be lawful for the said CD, his executors, administrators, or assigns, at all

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times hereafter during the continuance of the said term of thirty-two years to enter into the said premises hereby assigned or intended so to be, and to occupy and enjoy the same, and to take the rents, issues, and profits thereof, without any interruption, or disturbance whatsoever of or by him, the said AB, his executors, administrators, or any person or persons lawfully or equitably claiming or to claim by, from, or under, or in trust for him, them, or any of them, and that free and clear, and freely and absolutely acquitted, exonerated, and discharged or otherwise by the said AB, his heirs, executors, and administrators, well and sufficiently saved, defended, kept harmless, and indemnified from and against all, and all manner of former and other estates, charges, mortgages, and incumbrances already or to be hereafter made, done, committed, or suffered by the said AB, his heirs, executors, or administrators, or by any other person or persons lawfully claiming or to claim by, from, or under or in trust for him, them, or any of them; and moreover that he, the said AB, his executors and administrators, and all and every other person or persons rightfully claiming or to claim any estate, right, title, or interest in or to the said premises hereby assigned or intended so to be by, from, through, under, or in trust for him, the said AB, his executors or administrators, shall, and will at all times during the residue of the said term of thirty-two years, upon the request and at the expense of the said CD, his executors, administrators, and assigns, execute all such further assurance for the further assuring the said premises hereby assigned, or intended so to be, with their appurtenances, unto the said CD, his executors, administrators, and assigns, for the then remainder of the said term of thirty-two years, as by the said CD, his executors, administrators, or assigns, shall be reasonably required. And the said CD doth hereby for himself, his executors and administrators, covenant with the said AB, his executors, administrators, and assigns, that he, the said CD, his executors, administrators, and assigns, shall and will from time to time, and at all times hereafter, pay the quarterly rent of £ , by the said indenture of lease reserved, which, as from the shall grow due and payable in respect of the premises hereby assigned, at such times and in such manner as the same is hereby reserved, and also will observe and perform all the covenants, conditions, and agreements in the said indenture of lease contained, and which, on the part of the tenant, lessee, or assignee, are or ought to be performed and observed, and will at all times hereafter keep indemnified the said AB, his heirs, executors, and adminis-

trators against the payment of the said rent, and the performance and observance of the said covenants, conditions, and agreements, and against all actions, claims, and demands whatsoever on account of the non-payment of the said rent, and the non-observance and performance of the said covenants. In witness, &c.

CHAPTER II.

FORMS OF LICENSES.

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LESSEE TO BUILD AND		TRADE	333
CARRY ON TRADE ...	332	3. TO ASSIGN LEASEHOLD ...	333

1. *License by a Lessor to enable a Lessee to build and carry on a trade.*

Know all men by these presents that I, CG, do by this writing give my license and consent to JR, his executors, administrators, and assigns, to erect and build private dwelling-houses upon the piece of land marked in the plan drawn in the margin of these presents with the words "private houses," which piece of land is part of a larger piece of land comprised in and demised by an indenture of lease dated the day of , and expressed to be made between me, the said of the first part, of the second part, and the said of the third part, and to erect and build a forge upon the piece of land marked in the same plan with the word "forge," being other part of the said piece of land comprised in and demised by the same indenture of lease, and to erect and build shops and dwelling-houses upon the piece of land marked in the same plan with the word "shops," such last-mentioned piece of land being also other part of the said piece of land comprised in and demised by the said indentures of lease. Provided that, previous to any erections or buildings, in pursuance of this license, the plans and specifications thereof respectively shall be approved by , or other the surveyor for the time being of my estate. And I further give my license and consent to the said , his executors, administrators, or assigns, to carry on or permit or suffer to be carried on upon the said premises marked in the said plan with the word "shops," any art, trade, or business whatsoever other than the trade of a catgut spinner, hog-skinner, boiler of horseflesh, soapmaker, melter of tallow, metal founder, tinman, brazier, or any other noxious or

offensive trade or business. And also to carry on or permit or suffer to be carried on upon the said premises marked in the said plan with the word "forge," the trade or business of a farrier, blacksmith, and whitesmith, but not any other trade or business. As witness, &c.

2. License to carry on a particular trade in waiver of a restriction contained in a lease.

Memorandum, that I (lessor) do hereby give full liberty and license unto (lessee) of to use, exercise, and carry on, upon the messuage, and tenement, and premises, demised unto him by an indenture of lease, dated the day of , the trade or business of , and for that purpose if he shall think proper to convert the same into a shop or warehouse, for the sale of the several goods, wares, and other things incident, or belonging to the said business of upon this condition, nevertheless, that the said (lessee), his executors or administrators do, and shall before the expiration of the term of years granted to him by the said indenture of lease, reconvert the said premises into a private house or dwelling, and leave the same in such state of repair as is required by the terms of the said lease, in such and the same manner in all respects as if this license had not been given, or the said premises had not been converted into a place for sale of goods, wares, and other things. In witness, &c.

3. License to assign leasehold property.

Whereas, JHF and RH have made application to AB for his special license and consent to assign and transfer, and set over unto a piece or parcel of land or ground situate, lying, and being part of the premises demised by a certain indenture of lease dated, &c., granted by, &c., for a term of ninety-nine years, now or late in the tenure or occupation of the said RH; *Be it therefore known* that the said AB hath granted and given, and by these presents doth grant and give unto the said JHF and RH his license and consent to assign, transfer, and set over unto the said so much, and such part or parts of the premises demised by the said indenture of lease as are hereinbefore particularly mentioned and described, and which are now in the tenure or occupation of the said , for all the residue and remainder yet to come and unexpired of the said term of ninety-

CHAP. II.

nine years therein ; subject nevertheless to the payment of the rent reserved and made payable in and by the said indenture of lease, in manner and form therein mentioned, and to the observing, fulfilling, performing, and keeping all and singular the covenants, provisoes, conditions, restrictions, reservations, and exceptions therein contained, and which, on the part of the lessee, are and ought to be observed, performed, fulfilled, and kept according to the true intent and meaning of the said indenture of lease, and provided that the said , his executors or administrators, do not and shall not assign, transfer, or set over the said premises, or any part thereof, or grant any new underlease thereof, or of any part thereof, to any person or persons whomsoever for all or any part of the said residue of the said term without the further special license and consent of the said AB, his heirs or assigns, in writing under his or their hand or hands, first had and obtained. As witness, &c.

CHAPTER III.

NOTICES, DEMANDS, ETC.

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1. *Notice by Landlord to tenant from year to year to quit on a certain day.*

as follows
 Mr. A. B. *subscribed* *Sawty*
 I hereby give you notice to quit and deliver up to me on the
 // day of *Oct* 18*th* (a), the house and premises at
 , in the county of , now in your occupation,
 and which you hold of me as tenant from year to year.
 Dated the day of 18 .

C. D.

2. *Notice by tenant from year to year to landlord of quitting.*

Mr. A. B.

I hereby give you notice that I intend to quit and deliver

(a) If there is any doubt as to the day upon which the year's tenancy ends, the following words should be here inserted: "or at the expiration of the year of your tenancy which shall expire next after the end of one half-year from the service of this notice." Where the

tenancy is subject to the Agr. Hold. Act, the notice must be a twelve-month's notice (see s. 51 of Act in Appendix), and for the words "one half-year" in the above paragraph, the words "one whole year" must be substituted.

up to you on the day of 18, the house and premises now in my occupation, and which I hold of you as tenant from year to year. Dated this day of 18 .

C. D. (Tenant.)

3. *Notice by lessee to lessor determining lease.*

Mr. A. B.

In exercise of the power contained in the lease under which I now hold the house known as No. Street, I hereby give you notice that I intend to determine the said lease on the day of 18, on which day I shall deliver up to you the house and premises. Dated this day of 18 .

C. D. (Tenant.)

4. *Notice by lessor to lessee to do repairs.*

Mr.

I hereby require you forthwith to do the repairs specified at the foot hereof, and if such repairs are not done within calendar months from the date hereof, I shall cause the same to be done, and shall require you in performance of the covenant contained in the lease of the premises, to repay me the sum expended, together with interest, at 5 per cent., from the time of commencing the said repairs. Dated this day of 18 .

C. D. (Tenant.)

5. *Notice by mortgagee to tenant to pay rent.*

Mr.

Whereas the hereditaments now occupied by you have been conveyed to me in fee by way of mortgage for securing a sum of £ , I hereby give you notice to pay to me, or my agent, all arrears of rent now due, and all rent henceforth to become due. Dated this day of 18 .

A. N.

6. *Notice by landlord to tenant to pay rent.*

Mr. C. D.

I hereby require you to pay to me on the day of 18, the sum of £ , being the rent due at Martinmas last, in respect of the farm you hold of me under a lease. Dated this day of 18 .

A. B.

7. *Notice by Landlord to Sheriff, under 8 Anne, c. 14, s. 1, not to remove goods of execution debtor.*

To the Sheriff of the county of _____, and his under-sheriffs and bailiffs, and all others whom it may concern :

Take notice that the sum of £ _____ is now due and owing to me from CD of _____, in the county of _____, for one year's rent due on the _____ day of _____ last, of the premises in his occupation at _____ aforesaid; upon which premises, as I am informed, you have seized and taken in execution certain goods and chattels; and you are hereby required not to remove any of the said goods and chattels from off the said premises until the said arrears of rent are paid, pursuant to the statute, in such case made and provided. Dated this _____ day of _____ 18 ____.—Yours, &c., _____ A. B.

8. *Demand of possession pursuant to 15 & 16 Vict. c. 76, s. 213.*

To C. D.

SIR,—I do hereby, according to the form of the statute in such case made and provided, demand of and require you forthwith to quit and deliver up possession of the farm and premises, with the appurtenances, situate and being at _____, in the parish of _____, in the county of _____, and which were held by you under a lease bearing date the _____ day of _____ 18 ____, for the term of _____ years, which expired on or about the _____ day of _____ last. Dated this _____ day of _____ 18 ____.—Yours, &c., _____ A. B.

9. *Demand of possession at the end of a term of years claiming double rent or double value, ante, pp. 224, 226.*

To C. D.

SIR,—I do hereby demand of and require you to quit and deliver up possession of the farm and premises, with the appurtenances, situate at _____, in the parish of _____, in the county of _____, on the expiration of your term therein which shall expire on or about the _____ day of _____ next or instant; and take notice that if you hold over the said premises after the expiration of the term, you will be liable to pay double rent for the said premises, pursuant to the statute in such case made and provided. Dated this _____ day of _____ 18 ____.—Yours, &c., _____ A. B.

CHAP. III.

10. *Notice to Tenant to deliver up possession, pursuant to 1 & 2 Vict. c. 74, ante, p. 218.*

I, AB, do hereby give you notice, that unless peaceable possession of the farm and premises situate at _____, held of me under a tenancy from year to year, which was determined on the _____ day of _____, and which farm and premises is now held over and detained, be given to _____ on or before the expiration of seven clear days from the service of this notice, I, AB, shall on _____ next, the _____ day of _____, at _____ of the clock of the same day, at _____, apply to Her Majesty's Justices of the Peace acting for the district of (a) _____, in petty sessions assembled, to issue their warrant directing the constables of the said district to enter and take possession of the said farm and premises, and to eject any person therefrom. Dated this _____ day of _____ 18 ____.

(Signed) A. B.

To C. D.

11. *Warrant to distrain on a farm for rent.*

To C. D., my bailiff.

I hereby authorise and require you to distrain the goods and chattels, and also the cattle and growing crops, in and upon the farm lands and premises of EF situate at _____ in the parish of _____ in the county of _____, for £ _____, being _____ quarters rent due to me for the same at Lady Day last, and to proceed thereon for the recovery of the said rent as the law directs. But you are hereby expressly prohibited from taking any property not legally liable to a distress for rent. Dated this _____ day of _____ 18 ____.

(Signed) A. B.

12. *Notice of distress for rent.*

To E. F., and all others whom it may concern.

Take notice that I, CD, as bailiff for AB, your landlord, have this day distrained on the farm lands and premises in your occupation or possession, mentioned in the inventory hereunto annexed, the goods and chattels, and also the cattle and growing crops mentioned in the said inventory, for £ _____, being _____ quarters rent due to the said AB at Lady Day last, for the said farm lands and premises; and unless you pay the said rent, with the charges of distraining

(a) The district in which the premises are situate.

for the same, within five days from the date hereof, the said goods and chattels, and the said cattle, will be appraised and sold according to law, and the said AB will proceed to cut, gather, carry, and lay up the said crops when ripe in the barn, or other proper place on the said premises, and in convenient time sell and dispose of the same in satisfaction of the said rent, and of the charges of such distress, appraisement, and sale, according to law. Dated this day of 18 .

(Signed) C. D., of
Bailliff of the above A. B.

13.—IMPROVEMENTS.

Landlord's consent pursuant to 14 & 15 Vict. c. 25, s. 3, to the tenant erecting buildings, &c., ante, p. 245.

To C. D. of

I hereby consent that you may, at your own cost and expense, erect or put up in [*describe the situation of the proposed improvements*], being part of the property now occupied by you as my tenant, situate at in the parish of , in the county of [*here describe the improvements and the purpose for which they are designed*].

As witness my hand, this day of 18 .
(Signed) A. B.

14. *Notice to landlord pursuant to 14 & 15 Vict. c. 25, s. 3, of tenant's intention to remove buildings, &c., ante, p. 245.*

To A. B.

SIR,—I hereby give you notice that at, or soon after, the expiration of one calendar month from the service of this notice, it is my intention to remove from the farm and premises situate at in the parish of in the county of , now in my occupation, all [*describe the buildings, &c., to be removed*].

As witness my hand this day of 18 .
(Signed) C. D. (b)

15. *Notice to Landlord pursuant to s. 12 of Agricultural Holdings Act (see Appendix of Statutes, post) (c).*

To A. B. of

SIR,—I hereby give you notice that after the expiration of seven days, and within forty-two days from the service of

(b) A similar form under the Agricultural Holdings Act may easily be framed from the above. (c) For improvements of the first class the landlord's consent in writing must be obtained.

CHAP. III.

this notice (d), it is my intention to begin to execute certain improvements of the second class mentioned in the 5th section of the Agricultural Holdings (England) Act, 1875, in and upon the land and premises situate at _____ in the parish of _____, in the county of _____, now in my occupation. The above-mentioned improvements are as follows :—

16. *Notice of intention to claim compensation under Agricultural Holdings Act.*

I hereby give you notice of my intention to claim compensation under the Agricultural Holdings Act, 1875, for improvements executed by me upon the land and premises now in my occupation (e). And I also give you notice of my intention to claim compensation under the above statute for the breach of a covenant [or other agreement connected with the contract of tenancy] upon your part to repair and keep in repair, &c., such covenant being contained in a lease dated the _____ day of _____

The following are the particulars of my intended claim with respect to improvements under the above statute.

(Signed) A. B.

To C. D.

17. *Counter notice by landlord.*

I hereby give you notice of my intention to make a claim for compensation upon you under the Agricultural Holdings Act, 1875, you having given me a notice, dated the _____ day of _____, of your intention to claim compensation under that Act from me.

The following are the particulars of my intended claim (f).

(d) The tenant must not begin to execute the improvements till after the expiration of seven days from the service of the notice. See s. 12 of Agricultural Holdings Act, Appendix of Statutes, *post*.

(f) It seems that this claim can only be raised by way of counter claim. See s. 19, Appendix of Statutes, *post*.

(e) This notice must be given one month before the determination of the tenancy. See s. 20, Appendix of Statutes, *post*.

CHAPTER IV.

FORMS OF PLEADINGS, ETC.

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2. STATEMENTS OF CLAIM, ETC.	342	POSSESSION, ETC. ...	345

1. *Indorsements of Writs.*

Amongst the general indorsements of writs given by Appendix A, Part II., Section I., of the First Schedule of the Judicature Act, 1875, are the following:—

The plaintiff's claim is £ for arrears of rent. Rent.

The plaintiff's claim is £ for the use and occupation Use and occupa-
of a house. tion.

The plaintiff's claim is £ for money paid for rent Rent paid.
due by the defendant.

The plaintiff's claim is £ against the defendant AB Surety for
as principal, and against the defendant CD as surety for the arrears of rent.
price of arrears of rent.

The plaintiff's claim is £ for crops, tillage, manure Waygoing crops,
[or as the case may be] left by the defendant as outgoing &c.
tenant of a farm.

By Section II., the following indorsement for costs, &c., may be added to the above forms:—

And £ for costs; and if the amount claimed be paid to the plaintiff, or his solicitor, within four days [*or if the writ is to be served out of the jurisdiction or notice in lieu of service allowed, insert the time for appearance limited by the order*] from the service hereof, further proceedings will be stayed.

The following indorsements are taken from Section IV.:—

The plaintiff's claim is in replevin for goods wrongfully Replevin.
distrained.

The plaintiff's claim is for damages for improperly dis- Distress.
training [*this form shall be sufficient whether the distress complained of be wrongful, or excessive, or irregular, and whether the claim be for damages only or for double value*].

CHAP. IV.	The plaintiff's claim is to recover possession of a house,
Ejectment.	No. in Street, situate in the parish of , in the county of .
To establish title and recover rent.	The plaintiff's claim is to establish his title to [<i>here describe the property</i>], and to recover the rents thereof. [The two last forms may be combined.]
Covenant for fire insurance.	The plaintiff's claim is for damages, for breach of a con- tract to insure a house.
Repairs.	The plaintiff's claim is for damages for breach of a con- tract to repair.
Breach of cove- nants in lease of a farm.	The plaintiff's claim is for damages for breaches of cove- nants contained in a lease of a farm.
Contract to let a house.	The plaintiff's claim is for damages for breach of a con- tract to let [<i>or take</i>] a house.
Sale of a lease.	The plaintiff's claim is for damages for breach of a con- tract to sell [<i>or purchase</i>] the lease with goodwill, fixtures, and stock-in-trade of a public-house.
Mandamus.	Add to indorsement :—And for a mandamus. And for an
Injunction.	injunction.
Mesne profits, &c.	Add to indorsement where claim is to land, or to establish title or both :—And for mesne profits. And for an account of rent or arrears of rent :—And for breach of covenant for [<i>repairs</i>].

2. Statements of Claim, &c.

In the High Court of Justice, 18 , B. No. .
Division.

Writ issued 3d August 1876.

Between A. B. , plaintiff,

and

C. D. , defendant.

Statement of Claim.

1. On the day of , the plaintiff, by deed, let the defendant a house and premises, No. 52 Street, in the City of London, for the term of 21 years, from the day of , at the yearly rent of £120, payable quarterly.

2. By the said deed the defendant covenanted to keep the said house and premises in good and tenantable repair.

3. The said deed also contained a clause for re-entry, entitling the plaintiff to re-enter upon the said house and premises, in case the rent thereby reserved, whether demanded or not, should be in arrear for 21 days, or in case the defendant should make default in the performance of any covenant upon his part to be performed.

The plaintiff claims—

- In the High Court of Justice, 18 , B. No. ,
Common Pleas Division.

Statement of Claim.

3. The defendant has disregarded the notice, and still retains possession of the house.

1. Possession of the house.

- The plaintiff proposes that this action should be tried in London.

CHAP. IV.

Defence and Counter Claim.

In the High Court of Justice, 18 , No. .
Common Pleas Division.

Between A. B. , plaintiff,

and

C. D. , defendant.

(By original action.)

And between C. D. , plaintiff,

and

A. B. , defendant.

(By counter claim.)

The defence and counter claim of the above-named C. D.—

1. Before the determination of the tenancy mentioned in the statement of claim, the plaintiff, AB, by writing dated the day of , and signed by him, agreed to grant to the defendant, CD, a lease of the house mentioned in the statement of claim, at the yearly rent of £150, for the term of twenty-one years, commencing from the day of , when the defendant CD's tenancy from year to year determined, and the defendant has since that date been and still is in possession of the house under the said agreement.
2. By way of counter claim the defendant claims to have the agreement specifically performed, and to have a lease granted to him accordingly, and for the purposes aforesaid, to have this action transferred to the Chancery Division.

In the High Court of Justice, 18 , No. .
Chancery Division.

(Transferred by order dated day of .)

Between A. B. , plaintiff,

and

C. D. , defendant.

(By original action.)

And between C. D. , plaintiff,

and

A. B. , defendant.

(By counter claim).

The reply of the plaintiff A.B.

The plaintiff, AB, admits the agreement stated in the defendant CD's statement of defence, but he refuses to grant to the defendant a lease, saying that such agreement provided that the lease should contain a covenant by the defendant to keep the house in good repair, and a power of re-entry by the plaintiff upon breach of such covenant, and the plaintiff says that the defendant has not kept the house in good repair, and the same is now in a dilapidated condition.

[*Title as above.*]
Joinder of Issue.

The defendant, CD, joins issue upon the plaintiff AB's statement in reply.

3. *Judgments and Writs of Possession, &c.*

Judgment in default of appearance in action for recovery of land.

In the High Court of Justice, 18 , B. No. .
Division.
Between A. B. , plaintiff,
and
C. D. , defendant.

30th November 18 .

No appearance having been entered to the writ of summons herein, it is this day adjudged that the plaintiff recover possession of the land in the said writ mentioned.

Præcipe for Writ of Possession.

In the High Court of Justice,
Division.
Between A. B. , plaintiff,
and
C. D. and others, defendants.

Seal a writ of possession directed to the Sheriff of
to deliver possession to A. B. of
Judgment dated day of

Writ of Possession.

In the High Court of Justice, 18 , B. No. .
Division.
Between A. B. , plaintiff,
and
C. D. and others, defendants.

Victoria, to the Sheriff of greeting—Whereas,
lately in our High Court of Justice, by a judgment of the
Division of the same Court (AB recovered) or (EF
was ordered to deliver to AB) possession of all that
with the appurtenances in your bailiwick : Therefore we com-
mand you that you omit not by reason of any liberty of your
county, but that you enter the same, and without delay you
cause the said AB to have possession of the said land and
premises with the appurtenances. And in what manner you
have executed this our writ make appear to the Judges of the

Division of our High Court of Justice immediately
after the execution hereof, and have you there then this writ.
Witness, &c.

CHAPTER V.

FORMS OF PROCEEDINGS IN REPLEVIN.

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1. *Notice to Distrainer of Goods or Cattle intended to be replevied. (a)*

In the County Court of _____, holden at
 Take notice that AB, of _____, whose goods [or "cattle"]
 you have distrained, intends to replevy the same, and has
 proposed as his sureties for the due prosecution of an action
 of replevin against you in the [here mention the Court in
 which the action is to be brought] EF of _____ and GH of _____
 , and that if you have any valid objection to make to
 the proposed sureties, or either of them, you must attend at
 [here insert place of office of registrar], on the _____ day of
 _____, at the hour of _____, when the bond will be sub-
 mitted to me for approval.

I. K.,
 Registrar of Court.

2. *Notice of Sureties. (b)*

In the County Court of _____, holden at _____,
 Between A. B. _____, plaintiff,
 and
 C. D. _____, defendant.

Take notice that the sureties whom I propose as my secu-
 rity in the above cause [here state the proceedings which have
 rendered the sureties necessary], are [here state the full names

(a) See 19 & 20 Vict. c. 108, ss. 63, 64, which requires this notice. Rules, but as no action has been commenced, it would seem that the

(b) See the County Court Rules, title of the action is wrong.
 134. The form is given by the

and additions of sureties, whether housekeepers or freeholders, and their residences for the last six months, therein mentioning the county or city, places, streets, and number if any].

Dated this day of 18 .

To the ———

3. *Affidavit of Justification.* (c)

In the County Court of , holden at ,
Between A. B. , plaintiff,
and

C. D. , defendant.

I, , of , one of the sureties for the defendant, make oath and say that I am a housekeeper [or "freeholder," as the case may be], residing at [describing particularly the county or city, the street or place, and the number of the house if any], that I am worth property to the amount of £ [the amount required by the practice of the Court], over and above what will pay my just debts [if security in any other action or for any other purpose, add, "and every other sum for which I am now security"]; that I am not bail or security in any other action or proceeding, or for any other person [or if security in any other action or actions, add, "except for CD, at the suit of EF, in the Court of , in the sum of £ , for GH, at the suit of JK, in the Court of , in the sum of £ , [specifying the several actions with the Courts in which they are brought, and the sums in which he has become bound]; that this my property to the amount of the said sum of £ [and if security in any other action, &c., "over and above all other sums for which I am now security as aforesaid"] consists of [here specify the nature and value of the property in respect of which the deponent proposes to become bondsman as follows, "stock in trade in my business of , carried on by me at , of the value of £ , of good book debts owing to me to the amount of £ , of furniture in my house at of the value of £ , of a freehold (or 'leasehold') farm of the value of £ , situate at , occupied by ; or of a dwelling-house of the value of £ , situate at , occupied by ;" or of other property, particularising each description of property with the value thereof], and that I have for the last six months resided at [describing the place of such residence, or if he has had more than one residence during that period, state in the same manner as above directed].

Sworn, &c.

(c) See County Court Rules, 135. the registrar. The opposite party
The affidavit is to be sworn before may dispense with the affidavit.

CHAP. V.

4. *Bond in Replevin under s. 66 of 19 & 20 Vict. c. 108, where the action of Replevin commenced in the County Court (a).*

Know all men by these presents that we, AB of
 CD of , and EF of , are held and firmly bound
 unto GH (*the distrainer*) of , in £ , to be paid to
 the said GH or his certain attorney, executors, administrators,
 or assigns, for which payment to be made we bind ourselves,
 and each and every of us, in the whole, our and each of our
 heirs, executors, and administrators, jointly and severally,
 firmly by these presents. Sealed with our seals, and dated
 this day of 18 .

Whereas, the above-named CD and EF, at the request of
 the said AB, have agreed to enter into the above-written
 obligation, and this security has been approved of by
 the registrar of the County Court of , holden
 at , as appears by his allowance in the margin hereof.

I approve of this
 bond.

I. K.,
 the Registrar.

Now the condition of this obligation is such that if the above
 bounden AB do and shall, within one month from the date
 of the said obligation, commence an action of replevin
 against the above-named GH, in the County Court of
 , holden at , for taking and unjustly detaining of certain
 goods and chattels of the said AB, to wit (*here insert the de-
 scription of the goods and chattels*), and prosecute such action
 with effect, and without delay, and do and shall also make
 return of the said goods and chattels, if return thereof shall be
 awarded, then this obligation shall be void and of no effect,
 otherwise shall be and remain in full force.

A. B. (L.S.)

C. D. (L.S.)

E. F. (L.S.)

Signed, sealed, and delivered by the above bounden in the
 presence of .

*[This bond does not require a stamp. If a deposit of money
 be made, the memorandum thereof shall follow the terms of
 the bond, and will not require a stamp].*

(a) Instead of a bond, a deposit
 of money may be made with the
 registrar (see 19 & 20 Vict. c.
 108, s. 71). The bond should be
 executed in the presence of a judge
 or registrar, or some other of the
 persons mentioned in 19 & 20
 Vict. c. 108, s. 58. If executed in
 the presence of the judge or regis-
 trar, it need not be attested (R. C.,
 136, 138). A bond to the judge

would be an irregularity only (see
Stansfeld v. Hellawell, 7 Exch. 373;
 21 L. J. Exch. 148). Where a bond
 executed by the party is tendered
 to the registrar, his duty is only to
 inquire into the sufficiency of the
 sureties, and he cannot refuse to
 receive it on the ground that the
 party is by law incapable of exe-
 cuting a valid bond.

CHAPTER VI.

*FORMS IN ACTION FOR THE RECOVERY OF SMALL
TENEMENTS IN THE COUNTY COURTS, AND IN
PROCEEDINGS BEFORE JUSTICES.*

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1. Summons to a Tenant or other person holding over.

No. of Plaintiff.

In the County Court of , at (Seal).

Between A. B., plaintiff.

[Address.]

[Description.]

and C. D., defendant.

[Address.]

[Description.]

You are hereby summoned to appear at a County Court to be holden at , on the day of 18 , at the hour of , in the noon, to answer the plaintiff wherefore you neglect or refuse to deliver up to him possession of a certain [*messuage with appurtenances, or part of a house, &c., or as the case may be*], situate at . And take notice, that the plaintiff claims of you for rent [*or "mesne profits"*] [*or for rent and mesne profits*] the sum of £ , for a period from the day of 18 , to the day of 18 . And further take notice, if you do not appear at the said Court, and show cause why you do not deliver up possession as aforesaid, the judge of the said Court may order that possession of the said premises be given

CHAP. VI.

by you to the plaintiff forthwith, or on or before such day as the judge shall name; and that if such order be made and be not obeyed, a warrant may issue to give possession to the plaintiff. Dated the day of 18 .

To the defendant.

I. K.,
Registrar of the Court.

Costs of this Summons, £ .

Claim for . .

Hours of attendance at the office of the registrar [*place of office*] from ten till four [*here insert the day on which the office will be closed*], when the office will be closed at one.

On Back.

Take Notice.—If the plaintiff in this action be not your immediate landlord, *you must*, upon your being served with the summons, or if the summons shall come to your *knowledge*, forthwith *give notice* thereof to your *immediate landlord*; and if you do *not* give such *notice*, you will be liable, under s. 53 of 19 & 20 Vict. c. 108, to forfeit to your immediate landlord *three years' back rent* of the premises held by you of him in respect of which the summons shall have issued.

2. *Summons under s. 52 of 19 & 20 Vict. c. 108, for non-payment of rent.*

(*Title of Court and Cause as ante, Form I.*)

You are hereby summoned to appear at a Court to be holden at on the day of 18 , at the hour of in the noon, to answer the plaintiff why possession of a certain situate at should not be given up to the plaintiff by reason of the rent payable in respect thereof by you being half a year in arrear, and the plaintiff having right by law to re-enter for the non-payment thereof, if you shall pay to the registrar the rent in arrear and the costs of this action, as stated at the foot of the summons, five clear days before the day you are required to appear to this summons, this action will cease: And take notice, that if you do not pay such rent in arrear and costs, or appear at the said Court and show cause why possession of the said should not be recovered against

you, you may be ordered by the Court to give possession of such premises to the plaintiff, and that if such order be not obeyed, a warrant may issue to give possession to the plaintiff.

I. K.,

Registrar of the Court.

Costs of this Summons, £

Hours of attendance [*dec., as in Form I.*]

3. Order for Recovery of Tenement.

No.

In the County Court of , at (Seal).
Between A. B. , plaintiff,

and

C. D. , defendant.

Upon the hearing of this cause at a Court holden this day, it is ordered that the defendant do give to the plaintiff possession of a certain [or messuage or part of a certain house with appurtenances, or as the case may be], situate at forthwith (or on the day of): And it is adjudged that the plaintiff do recover against the defendant the sum of £ for rent [or mesne profits] (or for rent and mesne profits), and £ costs: And it is ordered that the defendant do pay to the Registrar of the Court the sum [or sums] above mentioned on or before the day of 18 . Given under the seal of the Court the day of 18 .

By the Court.

I. K.,

Registrar of the Court.

To the defendant.

Take notice, that if you do not give such possession, a warrant may issue requiring the bailiff of the Court to give possession of the said to the plaintiff, and to levy the sum above mentioned together with further costs.

Hours of attendance [*as ante, Form I.*]

4. Warrant for giving possession of Tenement.

No. of plaint.

No. of warrant.

In the County Court of , at (Seal).
Between A. B. , plaintiff,

and

C. D. , defendant.

Whereas, at a Court holden at , on the day of 18 , it was ordered by the Court that the defendant

CHAP. VI.

should give the plaintiff possession of a certain [*as in summons*], situate at _____, and that the plaintiff should recover against defendant the sum of £ _____ for rent [*or mesne profits*] [*or rent and mesne profits*] and costs.

And whereas the defendant has not obeyed the said order, these are therefore to authorise and require you to forthwith give possession of the said hereinbefore mentioned premises to the plaintiff: and these are therefore further to require and order you forthwith to make and levy by distress and sale of the goods and chattels of the defendant, wheresoever they may be found within the district of this Court (excepting the wearing apparel and bedding of the defendant, or his family, and the tools and implements of his trade, if any, to the value of five pounds), the said sum and the expenses of this warrant and execution, and also to seize and take any money or bank notes (whether of the Bank of England or any other bank), and any cheques, bills of exchange, promissory notes, bonds, specialties, or securities for money of the defendant which may be there found, or such part, or so much thereof as may be sufficient to satisfy this execution, and the costs of making and executing the same, and to pay the amount so levied to the Registrar of this Court, and make return of what you have done under this warrant, immediately upon the execution thereof.

Given under the seal of the Court this _____ day of
18 ____.

By the Court.

I. K.,
Registrar of the Court.

To the High Bailiff of the said Court.

	£	s.	d.
Rent [<i>or mesne profits</i>],	.	.	.
[<i>Or rent and mesne profits</i>],	.	.	.
Costs,
Poundage for issuing this warrant,	.	.	.

Total amount to be levied, _____.

NOTICE.—The goods and chattels are not to be sold until after the end of five days next following the day on which they were seized, unless they be of a perishable nature, or at the request of the defendant.

Application (a) was made to the Registrar for this warrant at _____ minutes past the hour of _____, in the _____ noon of the _____ day of _____ 18 ____.

(a) 19 & 20 Vict. c. 108, s. 46.

5. *Notice of Owner's intention to apply to Justices to recover possession.*

I [owner or agent to _____, the owner, *as the case may be*], do hereby give you notice, that unless peaceable possession of the tenement [*shortly describe it*] situate at _____, which was held of me, or of the said _____ [*as the case may be*], under a tenancy from year to year, [*or as the case may be*] which expired [or was determined] by notice to quit from the said _____ [or otherwise *as the case may be*], on the _____ day of _____, and which tenement is now held over and detained from the said _____, be given to [the owner or agent] on or before the expiration of seven clear days from the service of this notice, I, _____, shall on _____ next, the _____ day of _____, at _____ of the clock of the same day, at _____, apply to Her Majesty's justices of the peace acting for the district of _____ [being the district, division, or place in which the said tenement or any part thereof is situate] in petty sessions assembled, to issue their warrant directing the constables of the said district to enter and take possession of the said tenement, and to eject any person therefrom. Dated this _____

To Mr. _____

[*Owner or Agent.*]

6. *Complaint before two Justices.*

The complaint of _____ [owner or agent, &c., *as the case may be*] made before us, two of Her Majesty's justices of the peace, acting for the district of _____, in petty sessions assembled, who saith that the said _____ did let to _____ a tenement consisting of _____, for _____, under the rent of _____, and that the said tenancy expired [or was determined] by notice to quit given by the said _____, *as the case may be*, on the _____ day of _____ the said _____, did serve on [the tenant overholding] a notice in writing of his intention to apply to recover possession of the said tenement [a duplicate of which notice is hereto annexed], by giving &c. [describing the mode in which the service was effected], and that, notwithstanding the said notice, the said _____ refused [or neglected] to deliver up possession of the said tenement, and still detains the same. Taken the _____ day of _____ before us,

A duplicate of the notice of intention to apply is to be annexed to this complaint.

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7. *Warrant to Peace Officers to take and give possession.*

Whereas [*set forth the complaint*] we, two of Her Majesty's justices of the peace, in petty sessions assembled, acting for the of , do authorise and command you on any day within days from the date hereof [*except on Sunday, Christmas Day, and Good Friday, to be added if necessary*], between the hours of nine in the forenoon and four in the afternoon, to enter [*by force if needful*], and with or without the aid of [*the owner or agent, as the case may be*], or any other person or persons whom you may think requisite to call to your assistance into and upon the said tenement, and to eject thereout any person, and of the said tenement full and peaceable possession to deliver to the said [*the owner or agent*]. Given under our hands and seal this day of .

To and all other constables and peace officers acting for the district of .

AGRICULTURAL HOLDINGS (ENGLAND) ACT.

38 & 39 VICT. C. 92.

ARRANGEMENT OF CLAUSES.

Preliminary.

A.D. 1875.

1. Short title.
2. Commencement of Act.
3. Extent of Act.
4. Interpretation.

Compensation.

5. Tenant's title to compensation.
6. Time in which improvement exhausted.
7. Amount of tenant's compensation in first class.
8. Amount of tenant's compensation in second class.
9. Amount of tenant's compensation in third class.
10. Consent of landlord for first class.
11. Deduction in first class for want of repair, &c.
12. Notice to landlord for second class.
13. Exclusion of compensation in third class after exhausting crop.
14. Exclusion of compensation for consumption of cake, &c., in certain cases.
15. Restrictions as to third class.
16. Deductions from compensation for taxes, rent, &c.
17. Set-off of benefit to tenant.
18. Tenant's compensation for breach of covenant.
19. Landlord's title to compensation.

Procedure.

20. Notice of intended claim.
21. Compensation agreed or settled by reference.
22. Appointment of referees and umpire.
23. Requisition for appointment of umpire by Inclosure Commissioners, &c.

A. D. 1875.

24. Exercise of powers of county court.
25. Mode of submission to reference.
26. Power for referee, &c., to require production of documents, administer oaths, &c.
27. Power to proceed in absence.
28. Form of award.
29. Time for award of referee or referees.
30. Reference to and award by umpire.
31. Duration of improvement to be found.
32. Award to give particulars.
33. Costs of reference.
34. Day for payment.
35. Submission not to be removable, &c.
36. Appeal to county court.
37. Recovery of compensation
38. Appointment of guardian.
39. Provisions respecting married women.
40. Costs in county court.
41. Service of notice, &c.

Charge of Tenant's compensation.

42. Power for landlord, on paying compensation, to obtain charge.
43. Advance made by a company for the improvement of land.
44. Duration of charge.

Crown and Duchy Lands.

45. Application of Act to Crown lands.
46. Application of Act to land of Duchy of Lancaster.
47. Application of Act to land of Duchy of Cornwall.

Ecclesiastical and Charity Lands.

48. Landlord, archbishop, or bishop.
49. Landlord, incumbent of benefice.
50. Landlord, charity trustees, &c.

Notice to Quit.

51. Time of notice to quit.

Resumption for Improvements.

52. Resumption of possession for cottages, &c.

Fixtures.

53. Tenant's property in fixtures, machinery, &c.

General Application of Act.

54. No restriction on contract.
 55. Adoption of parts of Act by agreement.
 56. Application of Act to future tenancies.
 57. Application of Act to existing tenancies.
 58. Exception of non-agricultural and small holdings.
 59. Exception where other compensation.
 60. General saving of rights.

CHAPTER 92.

An Act for amending the Law relating to Agricultural Holdings in England. [13th August 1875.]

Be it enacted by the Queen's most Excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the authority of the same, as follows :—

Preliminary.

1. This Act may be cited as The Agricultural Holdings Short title.
(England) Act, 1875.
2. This Act shall commence from and immediately after Commencement
the fourteenth day of February one thousand eight hundred of Act.
and seventy-six.
3. This Act shall not extend to Scotland or Ireland. Extent of Act. |
4. In this Act—
 “Contract of tenancy” means a letting of land for a Interpretation.
 term of years, or for lives, or for lives and years, or
 from year to year, or at will :

A. D. 1875.

“Determination of tenancy” means the cesser of a contract of tenancy by reason of effluxion of time, or from any other cause :

“Landlord” means the person for the time being entitled to possession of land subject to a contract of tenancy, or entitled to receipt of rent reserved by a contract of tenancy, whatever be the extent of his interest, and although the land or his interest therein is encumbered or charged by himself or his settlor, or otherwise, to any extent ; the party to a contract of tenancy under which land is actually occupied being alone deemed to be the landlord in relation to the actual occupier :

“Tenant” means the holder of land under a contract of tenancy :

“Landlord” or “tenant” includes the agent authorised in writing to act under this Act generally, or for any special purpose, and the executors, administrators, assigns, husband, guardian, committee of the estate, or trustees in bankruptcy, of a landlord or tenant :

“Holding” includes all land held by the same tenant of the same landlord for the same term under the same contract of tenancy :

“Absolute owner” means the owner or person capable of disposing, by appointment or otherwise, of the fee simple or whole interest of or in freehold, copyhold, or leasehold land, although the land or his interest therein is mortgaged, encumbered, or charged to any extent :

“County court,” in relation to a holding, means the county court within the district whereof the holding or the larger part thereof is situate :

“Person” includes a body of persons and a corporation aggregate or sole.

The designations of landlord and tenant shall, for the purposes of this Act, continue to apply to the parties to a contract of tenancy until the conclusion of any proceedings taken under this Act on the determination of the tenancy.

Compensation.

Tenant's title to compensation.

5. Where, after the commencement of this Act, a tenant executes on his holding an improvement comprised in either of the three classes following :—

FIRST CLASS.

Drainage of land.
 Erection or enlargement of buildings.
 Laying down of permanent pasture.
 Making and planting of osier beds.
 Making of water meadows or works of irrigation.
 Making of gardens.
 Making or improving of roads or bridges.
 Making or improving of water-courses, ponds, wells, or
 reservoirs, or of works for supply of water for agri-
 cultural or domestic purposes.
 Making of fences.
 Planting of hops.
 Planting of orchards.
 Reclaiming of waste land.
 Warping of land.

SECOND CLASS.

Boning of land with undissolved bones.
 Chalking of land.
 Clay-burning.
 Claying of land.
 Liming of land.
 Marling of land.

THIRD CLASS.

Application to land of purchased artificial or other pur-
 chased manure.
 Consumption on the holding by cattle, sheep, or pigs, of
 cake or other feeding stuff not produced on the
 holding ;—

he shall be entitled, subject to the provisions of this Act, to
 obtain, on the determination of the tenancy, compensation in
 respect of the improvement.

6. An improvement shall not in any case be deemed, for
 the purposes of this Act, to continue unexhausted beyond the
 respective times following after the year of tenancy in which
 the outlay thereon is made :

Time in which
 improvement
 exhausted.

Where the improvement is of the first class, the end of
 twenty years :

Where it is of the second class, the end of seven years :

Where it is of the third class, the end of two years.

A.D. 1875.

Amount of
tenant's com-
pensation in
first class.

7. The amount of the tenant's compensation in respect of an improvement of the first class shall, subject to the provisions of this Act, be the sum laid out by the tenant on the improvement, with a deduction of a proportionate part thereof for each year while the tenancy endures after the year of tenancy in which the outlay is made and while the improvement continues unexhausted; but so that where the landlord was not, at the time of the consent given to the execution of the improvement, absolute owner of the holding for his own benefit, the amount of the compensation shall not exceed a capital sum fairly representing the addition which the improvement, as far as it continues unexhausted at the determination of the tenancy, then makes to the letting value of the holding.

Amount of
tenant's com-
pensation in
second class.

8. The amount of the tenant's compensation in respect of an improvement of the second class shall, subject to the provisions of this Act, be the sum properly laid out by the tenant on the improvement, with a deduction of a proportionate part thereof for each year while the tenancy endures after the year of tenancy in which the outlay is made and while the improvement continues unexhausted.

Amount of
tenant's com-
pensation in
third class.

9. The amount of the tenant's compensation in respect of an improvement of the third class shall, subject to the provisions of this Act, be such proportion of the sum properly laid out by the tenant on the improvement as fairly represents the value thereof at the determination of the tenancy to an incoming tenant.

Consent of land-
lord for first
class.

10. The tenant shall not be entitled to compensation in respect of an improvement of the first class, unless he has executed it with the previous consent in writing of the landlord.

Deduction in
first class for
want of repair,
&c.

11. In the ascertainment of the amount of the tenant's compensation in respect of an improvement of the first class, there shall be taken into account, in reduction thereof, any sum reasonably necessary to be expended for the purpose of putting the same into tenantable repair or good condition.

Notice to land-
lord for second
class.

12. The tenant shall not be entitled to compensation in respect of an improvement of the second class, unless not more than forty-two and not less than seven days before beginning to execute it, he has given to the landlord notice in writing of his intention to do so, nor where it is executed after the tenant has given or received notice to quit, unless it is executed with the previous consent in writing of the landlord.

Exclusion of
compensation in
third class after
exhausting crop.

13. The tenant shall not be entitled to compensation in respect of an improvement of the third class, where, after the execution thereof, there has been taken from the portion of

the holding on which the same was executed, a crop of corn, potatoes, hay, or seed, or any other exhausting crop. A.D. 1875.

14. The tenant shall not be entitled to compensation in respect of an improvement of the third class, consisting in the consumption of cake or other feeding stuff, where, under the custom of the country or an agreement, he is entitled to and claims payment from the landlord or incoming tenant in respect of the additional value given by that consumption to the manure left on the holding at the determination of the tenancy. Exclusion of compensation for consumption of cake, &c., in certain cases.

15. In the ascertainment of the amount of compensation in respect of an improvement in the third class,— Restrictions as to third class.

(1.) There shall not be taken into account any larger outlay during the last year of the tenancy than the average amount of the tenant's outlay for like purposes during the three next preceding years of the tenancy, or other less number of years for which the tenancy has endured; and,

(2.) There shall be deducted the value of the manure that would have been produced by the consumption on the holding of any hay, straw, roots, or green crops sold off the holding within the last two years of the tenancy or other less time for which the tenancy has endured, except as far as a proper return of manure to the holding has been made in respect of such produce sold off.

16. The amount of the tenant's compensation shall be subject to the following deductions:— Deductions from compensation for taxes, rent, &c.

(1.) For taxes, rates, and tithe-rentcharge due or becoming due in respect of the holding to which the tenant is liable as between him and the landlord:

(2.) For rent due or becoming due in respect of the holding:

(3.) For the landlord's compensation under this Act.

17. In the ascertainment of the amount of the tenant's compensation there shall be taken into account in reduction thereof any benefit which the landlord has given or allowed to the tenant in consideration of the tenant executing the improvement. Set-off of benefit to tenant.

18. Where a landlord commits a breach of covenant or other agreement connected with the contract of tenancy, and the tenant claims under this Act compensation in respect of an improvement, then the tenant shall be entitled to obtain, on the determination of the tenancy, compensation in respect of the breach, subject and according to the provisions of this Act. Tenant's compensation for breach of covenant.

A.D. 1875.
Landlord's
title to com-
pensation.

19. Where a tenant commits or permits waste, or commits a breach of a covenant or other agreement connected with the contract of tenancy, and the tenant claims compensation under this Act in respect of an improvement, then the landlord shall be entitled, by counter-claim, but not otherwise, to obtain, on the determination of the tenancy, compensation in respect of the waste or breach, subject and according to the provisions of this Act.

But nothing in this section shall enable a landlord to obtain under this Act compensation in respect of waste or a breach committed or permitted in relation to a matter of husbandry more than four years before the determination of the tenancy.

Procedure.

Notice of
intended
claim.

20. Notwithstanding anything in this Act, a tenant shall not be entitled to compensation under this Act unless one month at least before the determination of the tenancy he gives notice in writing to the landlord of his intention to make a claim for compensation under this Act.

Where a tenant gives such a notice the landlord may, before the determination of the tenancy, or within fourteen days thereafter, give a counter-notice in writing to the tenant of his intention to make a claim for compensation under this Act.

Every such notice and counter-notice shall state, as far as reasonably may be, the particulars of the intended claim.

Compensa-
tion agreed
or settled by
reference.

21. The landlord and the tenant may agree on the amount and mode and time of payment of compensation to be paid to the tenant or to the landlord under this Act.

If in any case they do so agree, the difference shall be settled by a reference.

Appoint-
ment of
referee or
referees and
umpire.

22. Where there is a reference under this Act, a referee, or two referees and an umpire, shall be appointed as follows:—

- (1.) If the parties concur, there may be a single referee appointed by them jointly :
- (2.) If before award the single referee dies or becomes incapable of acting, or for seven days after notice from the parties, or either of them, requiring him to act, fails to act, the proceedings shall begin afresh, as if no referee had been appointed :
- (3.) If the parties do not concur in the appointment of a single referee, each of them shall appoint a referee :
- (4.) If before award one of two referees dies or becomes incapable of acting, or for seven days after notice

from either party requiring him to act fails to act, the party appointing him shall appoint another referee :

- (5.) Notice of every appointment of a referee by either party shall be given to the other party :
- (6.) If for fourteen days after notice by one party to the other to appoint a referee, or another referee, the other party fails to do so, then, on the application of the party giving notice, the county court shall within fourteen days appoint a competent and impartial person to be a referee :
- (7.) Where two referees are appointed, then (subject to the provisions of this Act) they shall, before they enter on the reference, appoint an umpire :
- (8.) If before award an umpire dies or becomes incapable of acting, the referees shall appoint another umpire :
- (9.) If for seven days after request from either party the referees fail to appoint an umpire, or another umpire, then, on the application of either party, the county court shall, within fourteen days, appoint a competent and impartial person to be the umpire :
- (10.) Every appointment, notice, and request under this section shall be in writing.

23. Provided, that where two referees are appointed, an umpire may be appointed as follows :—

- (1.) If either party, on appointing a referee, requires, by notice in writing to the other, that the umpire shall be appointed by the Inclosure Commissioners for England and Wales, then the umpire, and any successor to him, shall be appointed, on the application of either party, by those Commissioners :
- (2.) In every other case, if either party, on appointing a referee, requires, by notice in writing to the other, that the umpire shall be appointed by the county court, then, unless the other party dissents by notice in writing therefrom, the umpire, and any successor to him, shall, on the application of either party, be so appointed, and in case of such dissent, the umpire, and any successor to him, shall be appointed, on the application of either party, by the Inclosure Commissioners for England and Wales.

Requisition for appointment of umpire by Inclosure Commissioners, &c.

24. The powers of the county court under this Act, relative to the appointment of a referee or umpire shall be exercisable by the judge of the court having jurisdiction, whether he is without or within his district, and may, by consent of the parties, be exercised by the registrar of the court.

Exercise of powers of county court.

A.D. 1875.
Mode of
submission
to reference.

25. The delivery to a referee of his appointment shall be deemed a submission to a reference by the party delivering it; and neither party shall have power to revoke a submission, or the appointment of a referee, without the consent of the other.

Power for
referee, &c.,
to require
production of
documents,
administer
oaths, &c.

26. The referee or referees or umpire may call for the production of any sample, or voucher or other document, or other evidence which is in the possession or power of either party, or which either party can produce, and which to the referee or referees or umpire seems necessary for determination of the matters referred, and may take the examination of the parties and witnesses on oath, and may administer oaths and take affirmations; and if any person so sworn or affirming wilfully and corruptly gives false evidence he shall be guilty of perjury.

Power to
proceed in
absence.

27. The referee or referees or umpire may proceed in the absence of either party where the same appears to him or them expedient, after notice given to the parties.

Form of
award.

28. The award shall be in writing, signed by the referee or referees or umpire.

Time for
award of
referee or
referees.

29. A single referee shall make his award ready for delivery within twenty-eight days after his appointment.

Two referees shall make their award ready for delivery within twenty-eight days after the appointment of the last appointed of them, or within such extended time (if any) as they from time to time jointly fix by writing under their hands, so that they make their award ready for delivery within a time not exceeding in the whole forty-nine days after the appointment of the last appointed of them.

Reference to
and award
by umpire.

30. Where two referees are appointed and act, if they fail to make their award ready for delivery within the time aforesaid, then, on the expiration of that time, their authority shall cease, and thereupon the matters referred to them shall stand referred to the umpire.

The umpire shall make his award ready for delivery within twenty-eight days after notice in writing given to him by either party or referee of the reference to him, or within such extended time (if any) as the registrar of the county court from time to time appoints, on the application of the umpire or of either party, made before the expiration of the time appointed by or extended under this section.

Duration of
improvement
to be found.

31. The award shall find and state the time at which each improvement, in respect whereof compensation is awarded, is taken, for the purposes of the award, to be exhausted.

Award to
give parti-
culars.

32. The award shall not award a sum generally for compensation, but shall, as far as reasonably may be, specify—

The several improvements, acts, and things in respect whereof compensation is awarded ; A.D. 1875.

The time at which each thereof was executed, committed, or permitted ;

In the case of an improvement of the first class, where the landlord was not at the time of the consent given to the execution thereof absolute owner of the holding for his own benefit, the extent to which the improvement adds to the letting value of the holding ;

The sum awarded in respect of each improvement, act, or thing ; and,

The sum laid out by the tenant on each improvement.

33. The costs of and attending the reference, including the remuneration of the referee or referees and umpire, where the umpire has been required to act, and including other proper expenses, shall be borne and paid by the parties in such proportion as to the referee or referees or umpire appears just, regard being had to the reasonableness or unreasonableness of the claim of either party in respect of amount, or otherwise, and to all the circumstances of the case. Costs of reference.

The award may direct the payment of the whole or any part of the costs aforesaid by the one party to the other.

The costs aforesaid shall be subject to taxation by the registrar of the county court, on the application of either party, but that taxation shall be subject to review by the judge of the county court.

34. The award shall fix a day, not sooner than one month after the delivery of the award, for the payment of money awarded for compensation, costs, or otherwise. Day for payment.

35. A submission or award shall not be made a rule of any court, or be removable by any process into any court, and an award shall not be questioned otherwise than as provided by this Act. Submission not to be removable, &c.

36. Where the sum claimed for compensation exceeds fifty pounds, either party may, within seven days after delivery of the award, appeal against it to the judge of the county court on all or any of the following grounds :— Appeal to county court.

- (1.) That the award is invalid ;
- (2.) That compensation has been awarded for improvements, acts, or things, breaches of covenants or agreements, or for committing or permitting waste, in respect of which the party claiming was not entitled to compensation ;
- (3.) That compensation has not been awarded for improvements, acts, or things breaches of covenants or

A. D. 1875.

agreements, or for committing or permitting waste, in respect of which the party claiming was entitled to compensation ;—

and the judge shall hear and determine the appeal, and may, in his discretion, remit the case to be reheard as to the whole or any part thereof by the referee or referees or umpire, with such directions as he may think fit.

If no appeal is so brought, the award shall be final.

The decision of the judge of the county court on appeal shall be final, save that the judge shall, at the request of either party, state a special case on a question of law for the judgment of the High Court of Justice, and the decision of the High Court on the case, and respecting costs and any other matter connected therewith, shall be final, and the judge of the county court shall act thereon.

Recovery of compensation.

37. Where any money agreed or awarded or ordered on appeal to be paid for compensation, costs, or otherwise, is not paid within fourteen days after the time when it is agreed or awarded or ordered to be paid, it shall be recoverable, upon order made by the judge of the county court, as money ordered by a county court under its ordinary jurisdiction to be paid is recoverable.

Appointment of guardian.

38. Where a landlord or tenant is an infant without a guardian, or is of unsound mind, not so found by inquisition, the county court, on the application of any person interested, may appoint a guardian of the infant or person of unsound mind for the purposes of this Act, and may change the guardian if and as occasion requires.

Provisions respecting married women.

39. The county court may appoint a person to act as the next friend of a married woman for the purposes of this Act, and may remove or change that next friend if and as occasion requires.

A married woman entitled for her separate use, and not restrained from anticipation, shall, for the purposes of this Act, be in respect of land as if she was unmarried.

Where any other married woman is desirous of doing any act under this Act, her husband's concurrence shall be requisite, and she shall be examined apart from him by the county court, or by the judge of the county court for the place where she for the time being is, touching her knowledge of the nature and effect of the intended act, and it shall be ascertained that she is acting freely and voluntarily.

Costs in county court.

40. The costs of proceedings in the county court under this Act shall be in the discretion of the court.

The Lord Chancellor may from time to time prescribe a

scale of costs for those proceedings, and of costs to be taxed by the registrar of the court. A.D. 1875.

41. Any notice, request, demand, or other instrument under this Act may be served on the person to whom it is to be given, either personally, or by leaving it for him at his last known place of abode in England, or by sending it through the post in a registered letter addressed to him there; and if so sent by post it shall be deemed to have been served at the time when the letter containing it would be delivered in ordinary course; and in order to prove service by letter it shall be sufficient to prove that the letter was properly addressed and posted, and that it contained the notice, request, demand, or other instrument to be served. Service of notice &c.

Charge of Tenant's Compensation.

42. A landlord, on paying to the tenant the amount of compensation due to him under this Act, may obtain from the county court a charge on the holding in respect thereof. Power for landlord, on paying compensation, to obtain charge.

The court shall have power, on proof of the payment, and on being satisfied of the observance in good faith by the parties of the conditions imposed by this Act, to make an order charging the holding with repayment of the amount paid, or any part thereof, with such interest, and by such instalments, and with such directions for giving effect to the charge, as the court thinks fit.

But, where the landlord obtaining the charge is not absolute owner of the holding for his own benefit, no instalment or interest shall be made payable after the time when the improvement in respect whereof compensation is paid will, for the purposes of this Act, be taken to be exhausted.

The instalments and interest shall be charged in favour of the landlord, his executors, administrators, and assigns.

43. Any company now or hereafter incorporated by Parliament, and having power to advance money for the improvement of land, may take an assignment of any charge made by a county court under the provisions of this Act, upon such terms and conditions as may be agreed upon between such company and the person entitled to such charge; and such company may assign any charge so acquired by them to any person or persons whomsoever. Advance made by a company for the improvement of land.

44. The sum charged by the order of a county court under this Act shall be a charge on the holding for the landlord's interest therein, and for all interests therein subsequent to that of the landlord; but so that the charge shall not ex- Duration of charge.

A. D. 1875.

tend beyond the landlord's interest where the landlord is himself a tenant of the holding.

Crown and Duchy Lands.

Application of
Act to Crown
lands.

45. This Act shall extend and apply to land belonging to Her Majesty the Queen, her heirs and successors, in right of the Crown.

With respect to such land, for the purposes of this Act, the Commissioners of Her Majesty's Woods, Forests, and Land Revenues, or one of them, or other the proper officer or body having charge of such land for the time being, or in case there is no such officer or body, then such person as Her Majesty, her heirs or successors, may appoint in writing under the Royal Sign Manual, shall represent Her Majesty, her heirs and successors, and shall be deemed to be the landlord.

Any compensation payable under this Act by the Commissioners of Her Majesty's Woods, Forests, and Land Revenues, or either of them, in respect of an improvement of the first class, shall be deemed to be payable in respect of an improvement of land within section one of the Crown Lands Act, 1866, and the amount thereof shall be charged and repaid as in that section provided with respect to the costs, charges, and expenses therein mentioned.

Any compensation payable under this Act by those Commissioners, or either of them, in respect of an improvement of the second class, or of the third class, shall be deemed to be part of the expenses of the management of the Land Revenues of the Crown, and shall be payable by those Commissioners out of such money and in such manner as the last-mentioned expenses are by law payable.

Application of
Act to land of
Duchy of Lan-
caster.

46. This Act shall extend and apply to land belonging to Her Majesty, her heirs and successors, in right of the Duchy of Lancaster.

With respect to such land, for the purposes of this Act, the Chancellor for the time being of the Duchy shall represent Her Majesty, her heirs and successors, and shall be deemed to be the landlord.

The amount of any compensation payable under this Act by the Chancellor of the Duchy in respect of an improvement of the first class shall be deemed to be an expense incurred in improvement of land belonging to Her Majesty, her heirs or successors, in right of the Duchy, within section twenty-five of the Act of the fifty-seventh year of King George the Third, chapter ninety-seven, and shall be raised and paid as in that

section provided with respect to the expenses therein mentioned.

A.D. 1875.

The amount of any compensation payable under this Act by the Chancellor of the Duchy in respect of an improvement of the second class, or of the third class, shall be paid out of the annual revenues of the Duchy.

The amount of any compensation payable under this Act to the Chancellor of the Duchy shall be paid into the hands of the Receiver-General of the revenues of the Duchy, or of his sufficient deputy or deputies; and receipts shall be given by him or them for the same; and the same shall be applied as purchase money for land sold under The Duchy of Lancaster Lands Act, 1855, and is applicable under section two of that Act.

47. This Act shall extend and apply to land belonging to the Duchy of Cornwall.

Application of
Act to land of
Duchy of
Cornwall.

With respect to such land, for the purposes of this Act, such person as the Duke of Cornwall for the time being, or other the personage for the time being entitled to the revenues and possessions of the Duchy of Cornwall, from time to time, by sign manual, warrant, or otherwise, appoints, shall represent the Duke of Cornwall, or other the personage aforesaid, and be deemed to be the landlord, and may do any act or thing under this Act which a landlord is authorised or required to do thereunder.

Any compensation payable under this Act by the Duke of Cornwall, or other the personage aforesaid, in respect of an improvement of the first class, shall be deemed to be payable in respect of an improvement of land within section eight of The Duchy of Cornwall Management Act, 1863, and the amount thereof may be advanced and paid from the money mentioned in that section, subject to the provision therein made for repayment of sums advanced for improvements.

Ecclesiastical and Charity Lands.

48. Where lands are assigned or secured as the endowment of a see, the powers by this Act conferred on a landlord shall not be exercised by the archbishop or bishop, in respect of those lands, except with the previous approval in writing of the Estates Committee of the Ecclesiastical Commissioners for England.

Landlord,
archbishop or
bishop.

49. Where a landlord is incumbent of an ecclesiastical benefice, the powers by this Act conferred on a landlord shall not be exercised by him in respect of the glebe land or other

Landlord,
incumbent of
benefice.

A. D. 1875.

land belonging to the benefice, except with the previous approval in writing of the Governors of Queen Anne's Bounty (that is, the Governors of the Bounty of Queen Anne for the Augmentation of the Maintenance of the Poor Clergy).

In every such case the Governors of Queen Anne's Bounty may, if they think fit, on behalf of the incumbent, out of any money in their hands, pay to the tenant the amount of compensation due to him under this Act; and thereupon they may, instead of the incumbent, obtain from the county court a charge on the holding, in respect thereof, in favour of themselves.

Every such charge shall be effectual, notwithstanding any change of the incumbent.

The Governors of Queen Anne's Bounty, before granting their approval in any case under this section, shall give notice of the application for their approval to the patron of the benefice (that is, the person, officer, or authority, who, in case the benefice were then vacant, would be entitled to present thereto).

Landlord,
charity trustees,
&c.

50. The powers by this Act conferred on a landlord shall not be exercised by trustees for ecclesiastical or charitable purposes except with the previous approval in writing of the Charity Commissioners for England and Wales.

Notice to Quit.

Time of notice to
quit.

51. Where a half-year's notice, expiring with a year of tenancy, is by law necessary and sufficient for determination of a tenancy from year to year, a year's notice so expiring shall by virtue of this Act be necessary and sufficient for the same; but nothing in this section shall extend to a case where the tenant is adjudged bankrupt, or has filed a petition for a composition or arrangement with his creditors.

Resumption for Improvements.

Resumption of
possession for
cottages, &c.

52. Where on a tenancy from year to year a notice to quit is given by the landlord with a view to the use of land for any of the following purposes:—

- The erection of farm labourers' cottages or other houses, with or without gardens;
- The providing of gardens for existing farm labourer's cottages or other houses;
- The allotment for labourers of land for gardens or other purposes;

The planting of trees ;
 The opening or working of any coal, ironstone, limestone, or other mineral, or of a stone quarry, clay, sand, or gravel pit, or the construction of any works or buildings to be used in connection therewith ;
 The obtaining of brick, earth, gravel, or sand ;
 The making of a water-course or reservoir ;
 The making of any road, tramroad, siding, canal, or basin, or any wharf, pier, or other work connected therewith ;
 and the notice to quit so states, then it shall, by virtue of this Act, be no objection to the notice that it relates to part only of the holding.

In every such case the provisions of this Act respecting compensation shall apply as on determination of a tenancy in respect of an entire holding.

The tenant shall also be entitled to a proportionate reduction of rent in respect of the land comprised in the notice to quit, and in respect of any depreciation of the value to him of the residue of the holding, caused by the withdrawal of that land from the holding or by the use to be made thereof ; and the amount of that reduction shall be ascertained by agreement or settled by a reference under this Act, as in case of compensation (but without appeal).

The tenant shall further be entitled, at any time within twenty-eight days after service of the notice to quit, to serve on the landlord a notice in writing to the effect that he (the tenant) accepts the same as a notice to quit the entire holding, to take effect at the expiration of the then current year of tenancy ; and the notice to quit shall have effect accordingly.

Fixtures.

53. Where after the commencement of this Act a tenant affixes to his holding any engine, machinery, or other fixture for which he is not under this Act or otherwise entitled to compensation, and which is not so affixed in pursuance of some obligation in that behalf, or instead of some fixture belonging to the landlord, then such fixture shall be the property of, and be removable by, the tenant :

Tenant's property in fixtures, machinery, &c.

Provided as follows :—

1. Before the removal of any fixture the tenant shall pay all rent owing by him, and shall perform or satisfy all other his obligations to the landlord in respect of the holding :
2. In the removal of any fixture the tenant shall not do

A. D. 1875.

any avoidable damage to any building or other part of the holding :

3. Immediately after the removal of any fixture the tenant shall make good all damage occasioned to any building or other part of the holding by the removal :
4. The tenant shall not remove any fixture without giving one month's previous notice in writing to the landlord of the intention of the tenant to remove it :
5. At any time before the expiration of the notice of removal, the landlord, by notice in writing given by him to the tenant, may elect to purchase any fixture comprised in the notice of removal, and any fixture thus elected to be purchased shall be left by the tenant, and shall become the property of the landlord, who shall pay the tenant the fair value thereof to an incoming tenant of the holding ; and any difference as to the value shall be settled by a reference under this Act, as in case of compensation (but without appeal) :

But nothing in this section shall apply to a steam-engine erected by the tenant if, before erecting it, the tenant has not given to the landlord notice in writing of his intention to do so, or if the landlord, by notice in writing given to the tenant, has objected to the erection thereof.

General Application of Act.

No restriction
on contract.

54. Nothing in this Act shall prevent a landlord and tenant, or intending landlord and tenant, from entering into and carrying into effect any such agreement as they think fit, or shall interfere with the operation thereof.

Adoption of
parts of Act by
agreement.

55. A landlord and tenant, whether the landlord is absolute owner of the holding for his own benefit or not, may, in any agreement in writing relating to the holding, adopt by reference any of the provisions of this Act respecting procedure or any other matter, without adopting all the provisions of this Act ; and any provision so adopted shall have effect in connection with the agreement accordingly.

But where, at the time of the making of the agreement, the landlord is not absolute owner of the holding for his own benefit, no charge shall be made on the holding, under this Act, by virtue of the agreement, greater than or different in nature or duration from the charge which might have been made thereon, under this Act, in the absence of the agreement.

56. This Act shall apply to every contract of tenancy beginning after the commencement of this Act, unless, in any case, the landlord and tenant agree in writing, in the contract of tenancy, or otherwise, that this Act, or any part or provision of this Act, shall not apply to the contract; and, in that case, this Act, or the part or provision thereof to which that agreement refers (as the case may be), shall not apply to the contract.

A.D. 1875.

Application of Act to future tenancies.

57. In any case of a contract of tenancy from year to year or at will, current at the commencement of this Act, this Act shall not apply to the contract, if within two months after the commencement of this Act the landlord or the tenant gives notice in writing to the other to the effect that he (the person giving the notice) desires that the existing contract of tenancy between them shall remain unaffected by this Act; but such a notice shall be revocable by writing; and in the absence of any such notice, or on revocation of every such notice, this Act shall apply to the contract.

Application of Act to existing tenancies.

In every other case of a contract of tenancy current at the commencement of this Act, this Act shall not apply to the contract.

58. Nothing in this Act shall apply to a holding that is not either wholly agricultural or wholly pastoral, or in part agricultural and as to the residue pastoral, or that is of less extent than two acres.

Exception of non-agricultural and small holdings.

59. A tenant shall not be entitled to claim compensation under this Act and under any custom of the country or tract in respect of the same work or thing.

Exception where other compensation.

60. Except as in this Act expressed, nothing in this Act shall take away, abridge, or prejudicially affect any power, right, or remedy of a landlord, tenant, or other person, vested in or exercisable by him by virtue of any other Act or law, or under any custom of the country, or otherwise, in respect of a contract of tenancy or other contract, or of any improvement, waste, emblements, tillages, away-going crops, fixtures, tax, rate, tithe-rentcharge, rent, or other thing.

General saving of rights.

A. D. 1876.

AGRICULTURAL HOLDINGS (ENGLAND) ACT (1875) AMENDMENT.

CHAPTER 74.

An Act for amending so much of the Agricultural Holdings (England) Act, 1875, as relates to the Governors of the Bounty of Queen Anne for the Augmentation of the Maintenance of the Poor Clergy. [15th August 1876.]

Be it enacted by the Queen's most Excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the authority of the same, as follows :

Short title.

1. This Act may be cited as "The Agricultural Holdings (England) Act (1875) Amendment Act, 1876."

Repeal of enactments in schedule.

2. The part of an Act described in the schedule to this Act is hereby repealed ; but this repeal shall not affect anything done, or any right or liability accrued, under the repealed enactment, before the passing of this Act.

Approval of improvements by patron of benefice.

3. Section forty-nine of The Agricultural Holdings (England) Act, 1875, shall be read and have effect as if there had been inserted therein after the word "writing" the following words, "of the patron of the benefice (that is, the person, officer, or authority who, in case the benefice were vacant, would be entitled to present thereto), or."

SCHEDULE.

PART OF ACT REPEALED.

38 & 39 Vict. c. 92.	<p>The Agricultural Holdings } in part ; (England) Act, 1875 . } namely,— The last paragraph of Section Forty-nine ; (that is to say), The Governors of Queen Anne's Bounty, before granting their approval in any case under this section, shall give notice of the application for their approval to the patron of the benefice (that is, the person, officer, or authority who, in case the benefice were then vacant, would be entitled to present thereto).</p>
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